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A Feminist Approach to Social Scientific Evidence: Foundations

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A FEMINIST APPROACH TO SOCIAL SCIENTIFIC EVIDENCE: FOUNDATIONS

*Andrew E. Taslitz**

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INTRODUCTION

An enormous volume of scholarly literature has been written about *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ in the few years since the U.S. Supreme Court decided that case.² *Daubert* rejected the requirement of *Frye v. United States*³ that novel scientific evidence be generally accepted in the relevant scientific field in order to be admissible. Instead, the Court in *Daubert* concluded that the Federal Rules of Evidence embodied a more flexible relevance and reliability test.⁴ That test required consideration of at least five factors: (1) whether the theory or technique could be, or had been, tested; (2) whether the theory or technique had been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the principle or technique had widespread acceptance.⁵ What scholars have ignored, however, is that the *Daubert* test and factors—or at least a particular reading of that test and those factors—reflect patriarchal assumptions about the nature of knowledge.

Those assumptions include the idea of a “realist epistemology,” an objective reality waiting “out there” to be discovered.⁶ Moreover,

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1. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
 2. See, e.g., David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying about the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799 (1994); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939 (1996); John H. Mansfield, *Scientific Evidence Under Daubert*, 28 ST. MARY'S L.J. 1 (1996).
 3. *Frye v. United States*, 293 F.2d 1013, 1014 (D.C. Cir. 1923).
 4. See *Daubert*, 509 U.S. at 587; see also Andrew E. Taslitz, *Daubert's Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence*, 32 HARV. J. ON LEGIS. 3, 46–48 (1995) [hereinafter Taslitz, *Daubert's Guide*] (summarizing the new *Daubert* test).
 5. See *Daubert*, 509 U.S. at 595–96; see also Taslitz, *Daubert's Guide*, *supra* note 4, at 48–50.
 6. David L. Faigman, *The Evidentiary Status of Social Science Under Daubert: Is It “Scientific,” “Technical,” or “Other” Knowledge?*, 1 PSYCHOL. PUB. POL'Y & L. 960, 969 (1995) [hereinafter Faigman, *Social Science*] (“These two criteria [falsifiability

despite *Daubert's* rejection of the *Frye* general-acceptance test, *Daubert* continues to rely on a masculinist, market-based notion of truth: the fierce competition for dominance and reward in the free marketplace of ideas will weed out flawed conceptions of the one true objective reality that we seek to discover.⁷ Furthermore, the market-based notion of truth tests ideas based on linear, universal standards of what constitutes knowledge.⁸ The "universal" standards privilege theory over context and experience.⁹ The market and the Court also make a dualistic determination, qualifying evidence as either "science" or "non-science," with the former granted far greater epistemic value.¹⁰ The boundary between "science" and "non-science" must be carefully policed.¹¹ Additionally, *Daubert* expresses a fundamental distrust of community-based, collaborative, non-hierarchical decision-making—

and 'error rate'] clearly indicate the Court's choice of a conventional, scientific realist view of the scientific method.").

7. See *Daubert*, 509 U.S. at 592–95 (retaining widespread acceptance, peer review, and publication as factors in the admissibility decision); KARL R. POPPER, *Reason or Revolution?*, in THE MYTH OF THE FRAMEWORK 69 (1993) [hereinafter POPPER, FRAMEWORK] (stating "the objectivity of natural and social science is not based on an impartial state of mind in the scientists, but merely on the public and competitive character of the scientific enterprise and thus on certain social aspects of it") (emphasis added). I develop an analysis of *Daubert's* reliance on a masculinist, market-based notion of truth in my forthcoming companion piece, Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence Revisited: On Markets, Dualisms, and Historical Method* (forthcoming 1999) [hereinafter Taslitz, *Feminist Approach Revisited*]. I will refer to *Feminist Approach Revisited* or the companion piece as a shorthand to indicate I will develop that argument more fully therein.
8. See POPPER, FRAMEWORK, *supra* note 7, at 69–70.
9. See *infra* text accompanying notes 18–33, 38–51; see also Taslitz, *Feminist Approach Revisited*, *supra* note 7.
10. See *Daubert*, 509 U.S. at 590 (stressing the distinction between "science" and "non-science" and grounding the "admissibility" analysis in a conception of sound scientific methods); Faigman, *Social Science*, *supra* note 6, at 962 (reading *Daubert* as recognizing science's epistemic superiority over other methods of inquiry).
11. See Taslitz, *Feminist Approach Revisited*, *supra* note 7; see also Faigman, *Social Science*, *supra* note 6, at 962 (noting that "the U.S. Supreme Court embraces Popper's criterion of 'falsifiability' to distinguish scientific statements from nonscientific statements," and interpreting Fed. R. Evid. 702 as "regulating that supply of facts to the jury in a manner that states a preference for science as the preeminent method for discovering most facts"); see also Larry Laudan, *The Demise of the Demarcation Problem*, 2.1 WORKING PAPERS: THE DEMARCATION BETWEEN SCIENCE AND PSEUDO-SCIENCE 8 (1988) ("[M]uch of our intellectual life, and increasingly large portions of our social life, rest on the assumption that we . . . can tell the difference between science and its counterfeit."); see generally CHARLES ALAN TAYLOR, *DEFINING SCIENCE: A RHETORIC OF DEMARCATION* 5 (1996) (describing the demarcation of science from non-science as central to practicing scientists' efforts to maintain their privileged position of "epistemic authority").

that is, the decision-making of juries. *Daubert* requires judges to be gatekeepers against information that will be abused by the communal whole.¹² Finally, *Daubert* embodies an insistence on objectivity, a belief that politics and values serve no proper role in scientific or evidentiary reasoning.¹³ This final point follows from *Daubert's* assumption that a "true" answer to our questions is waiting to be found, not constructed.¹⁴

How *Daubert* reflects these assumptions and why they are patriarchal will be discussed shortly here and at more length in a companion piece. To say that something is patriarchal does not, however, necessarily mean that it is wrong. To the contrary, patriarchal science and evidence law have achieved important ends in many spheres.¹⁵ But there is one type of factual inquiry—the determination of mental state—for which the feminist critique holds particular force.

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12. See *Daubert*, 509 U.S. at 597. *Daubert's* distrust of the jury is embodied in the Court's notion of trial judges as "gatekeepers," protecting juries from being misled by pseudo-scientific evidence. *Daubert*, 509 U.S. at 597. *Daubert* also contained contradictory language, rejecting "overly pessimistic" views "about the capabilities of the jury and the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. Nevertheless, post-*Daubert* scholarship has often tended to emphasize the reason for keeping poor science from juries rather than ways to improve juries' handling of purported scientific evidence. See, e.g., Faigman, *Social Science*, *supra* note 6; David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997) [hereinafter Faigman, *Age of Science*]; see generally KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (1997) (seeking to improve judicial screening of scientific evidence from juries under *Daubert*). Although the Court has recently stated that *Daubert* admits a "somewhat broader range of scientific testimony than would have been admissible under *Frye*," thus hinting perhaps at a slightly more flexible reading of *Daubert* than some commentators might allow, nothing in that recent pronouncement undermines the argument that *Daubert* embodies a realist epistemology and still requires a serious "gatekeeper" role for the trial judge. See *General Elec. Co. v. Joiner*, 118 S. Ct. 512, 517 (1997). Also, the Court recently decided another case that shed further light on *Daubert*, but not in a way that alters the analysis here. See *United States v. Schefer*, 118 S. Ct. 1265 (1998) (addressing constitutional issues involved in excluding polygraph evidence). I will discuss the remaining universalist, market-based, and dualistic aspects of *Daubert* in *Taslitz, Feminist Approach Revisited*, *supra* note 7.
 13. See *Daubert*, 509 U.S. at 579; see also Faigman, *Age of Science*, *supra* note 12, at 68–69 (condemning the political aspects of scientific and evidentiary reasoning about the battered woman syndrome).
 14. See *Daubert* 509 U.S. at 579; see also Faigman, *Social Science*, *supra* note 6.
 15. See Faigman, *Social Science*, *supra* note 6, at 962 ("In identifying, predicting, and controlling the world around us, science is by far the most powerful intellectual tech-

Mental states do not exist "out there," but rather are the result of an interpretive act. Mental states are thus social constructions constituted in language. Feminism, unlike patriarchal science, embraces the notion of a linguistic, interpretive, socially constructed reality.¹⁶ For such a reality the realist epistemology of *Daubert* makes little sense. That does not mean anything goes: relativism need not be the necessary consequence of rejecting realism. But judging the plausibility of an interpretive act is a very different endeavor from a realist inquiry,

nique known."); RONALD L. CARLSON ET. AL., EVIDENCE IN THE NINETIES (3d ed., 1992) (recounting the ways in which evidence doctrine helps to prevent jury misdecision). Neither Professor Faigman nor Professors Carlson, Imwinkelried, and Kionka recognize that the versions of scientific and evidentiary method that they praise reflect androcentric thinking. For analyses of the androcentric biases in science, see for example, SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986) [hereinafter HARDING, SCIENCE QUESTION]; SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE: THINKING FROM WOMEN'S LIVES (1991) [hereinafter HARDING, WHOSE SCIENCE?]; HELEN E. LONGINO, SCIENCE AS SOCIAL KNOWLEDGE: VALUES AND OBJECTIVITY IN SCIENTIFIC INQUIRY (1990). But see PAUL R. GROSS & NORMAN LEVITT, HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE (1994) (challenging the "muddleheadedness" of postmodern and cultural constructivist critiques of scientific method); ELLEN R. KLEIN, FEMINISM UNDER FIRE (1996) (rejecting feminist claims that scientific method is fundamentally male-centered). For analyses of androcentric thinking in evidence law, see Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories From the Evidence Casebook*, 88 NW. U. L. REV. 914 (1994); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127 (1996); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413; Marilyn MacCrimmon, *The Social Construction of Reality and the Rules of Evidence*, 25 U. BRIT. COLUM. L. REV. 36 (1991); Aviva Orenstein, "My God!" A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159 (1997) [hereinafter Orenstein, *My God!*]; Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996) [hereinafter Taslitz, *Patriarchal Stories*]. I am not suggesting that patriarchal science and evidence law do not have serious flaws. Indeed, both have often worked to support gender and racial oppression. See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM (forthcoming N.Y.U. Press 1999) [hereinafter TASLITZ, CULTURE OF THE COURTROOM]. Nevertheless, the successes—including modern technology and at least some basics of a fundamentally fair due process—must be acknowledged. The perceived failure to recognize those successes indeed contributes to the assault on the credibility of feminist epistemologies. See GROSS & LEVITT, *supra*. My narrow claim here is that for a certain subset of issues defined below, the costs of patriarchal reasoning so outweigh the benefits that a feminist paradigm, rather than moderate feminist-sympathetic reform, should replace or at least serve as a co-equal complement to masculine scientific and evidentiary theories. Outside of expert-evidence questions, on the other hand, a more radical rethinking of evidence law along feminist lines may be required from the ground up. See TASLITZ, CULTURE OF THE COURTROOM, *supra*.

16. See *infra* Part I.

involving very different notions of "reliability" than are contained in the *Daubert* factors.¹⁷

Feminists are skeptical of the particular type of market-based reasoning contained in *Daubert's* endorsement of publication, peer review, and widespread acceptance. Feminists accept the need for the public critique of ideas, but such critique can take place with an attitude of connected knowing—of first looking for the best in an idea, rather than seeking to rip it to shreds in the snarling teeth of the competitive tiger.¹⁸ The attitude of connected knowing also recognizes the social nature of scientific and other knowledge. Science is then seen as a collaborative, group activity created by a relevant scientific community. Valid scientific knowledge may thus be produced in different ways by different scientific communities, so there is no one universal, totalizing, and dominant scientific method. Indeed, knowledge is better seen as contextual rather than universal, and insights from actual scientific practices and human experience, from the particular and the unique, need not be devalued relative to broad, universal theories.¹⁹ Such theories, indeed, may be especially misleading when

17. See *infra* Parts II & III; see also Taslitz, *Feminist Approach Revisited*, *supra* note 7.

18. See Taslitz, *Feminist Approach Revisited*, *supra* note 7.

19. The term "connected knowing" originated in MARY BELENKY ET AL., *WOMEN'S WAYS OF KNOWING* (1986). "Connected knowing" is characterized by a stance of belief and an entering into the place of the other person or idea that one is trying to know as a first step toward acquiring, validating, and evaluating knowledge claims. See Nancy Rule Goldberger, *Looking Backward, Looking Forward*, in *KNOWLEDGE, DIFFERENCE, AND POWER* 1, 5 (Nancy Rule Goldberger et al. eds., 1996) [hereinafter Goldberger, *Looking Backward*]. Connected knowing is often contrasted with "separate knowing," which is characterized by a distanced, skeptical, and impartial stance toward that which one is trying to know. See Goldberger, *Looking Backward*, *supra* at 5. See Blyth McVicker Clinchy, *Connected and Separate Knowing: Toward a Marriage of Two Minds*, in *KNOWLEDGE, DIFFERENCE, AND POWER*, *supra* at 205-47, for a detailed explanation of the difference between "separate" and "connected" knowing. I argue in the companion piece for a third way, "constructed knowing," the position at which truth is understood to be contextual; knowledge is recognized as tentative, not absolute; and it is understood that the knower is part of (constructs) the known. See Goldberger, *Looking Backward*, *supra* at 5. Most importantly for our purposes here, constructed knowing entails a "flexibility in approaches to knowing and ability to assess the appropriateness and utility of a particular way of knowing given the moment, situation, cultural and political imperatives, and relational and ethical ramifications." Nancy Rule Goldberger, *Cultural Imperatives and Diversity in Ways of Knowing*, in *KNOWLEDGE, DIFFERENCE, AND POWER*, *supra* at 335, 357. Sensible scientific "knowing" may thus require both separate and connected knowing. Rather than exploring the complexities of these different styles of knowing here (a task I leave for the companion piece), I loosely use the term "connected knowing" as a shorthand for

studying mental states, because human thought often relies on nonlinear processes, using metaphor, dialogue, ambiguity, and irony, in sharp contrast to the rigid deductive and inductive thinking of patriarchal science.²⁰

Feminism rejects, as well, the dualism of patriarchal science: the policing of a sharp boundary between privileged "science" and unworthy "non-science." Feminists do not see the distinctions as so clear, nor do feminists necessarily privilege one side of the boundary over the other in all contexts.²¹ There is instead a continuum, band, or loop linking shades of science and shades of non-science, and different points on the continuum might be appropriate for different purposes. Some practices generally denominated "scientific" involve reasoning more similar to that of historians than physicists, yet the historical mode of reasoning may be closer to the task at trial—recreating and understanding a past event—and more useful and "scientific" for evidentiary purposes than any model based on laboratory physics.²²

Feminists will generally prefer solutions that maximize communal and contextual decision-making and, therefore, favor increasing the quantity and quality of scientific evidence, rather than its exclusion, as a goal of evidence law.²³ Given the interpretive and social nature of mental-state determinations, feminists recognize the inherently political nature of the relevant evidence rules and view political considerations, broadly defined, as unavoidably tied to epistemological ones.²⁴ *Daubert's* pretext of universal objectivity is thus rejected by

emphasizing that there are other ways of knowing than the "separate knowing" most often associated with male thinking.

20. See ROBERT GRUDIN, *ON DIALOGUE: AN ESSAY IN FREE THOUGHT* (1996) (illustrating and praising nonlinear thought processes).
21. See Taslitz, *Feminist Approach Revisited*, *supra* note 7; see also HARDING, *WHOSE SCIENCE?*, *supra* note 15, at 85 (stating that no one has ever determined what is "unique about the scientific method"); RUTH BLIER, *SCIENCE AND GENDER: A CRITIQUE OF BIOLOGY AND ITS THEORIES ON WOMEN* 4 (1984) (claiming there is "no single correct scientific methodology"); Sandra Harding, *Science is "Good to Think With"*, in *SCIENCE WARS* 16 (Andrew Ross, ed. 1996) ("[T]he natural and social sciences we have are in important respects incapable of producing the kinds of knowledge that are needed for sustainable human life . . . under democratic conditions.");
22. Historians' "reconstructions," especially of past mental states, are interpretive in much the same way as mental-state determinations at trials are. See Taslitz, *Feminist Approach Revisited*, *supra* note 7.
23. See *infra* text accompanying notes 109–12, 143–255; Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 113–14 (1993) [hereinafter Taslitz, *Myself Alone*].
24. See *infra* text accompanying notes 321–60.

feminists in favor of a candid political understanding of how scientific and legal knowledge are created, once again, without embracing relativism.²⁵

This Article addresses several of these aspects of a feminist approach to social scientific evidence, specifically, the interpretive nature of mental states, the feminist attitude toward juries, and the political nature of evidence law.

Recognizing that mental-state determination is an interpretive, political act lays the groundwork for addressing in the companion piece the remaining aspects of a feminist approach to social scientific evidence—specifically, the flaws of market-based reasoning and masculinist dualisms and the strengths of a non-relativist alternative. The present piece thus lays the foundation for the companion piece's articulation of a new feminist approach to admitting social scientific evidence. Before laying the first brick in that foundation, however, some points of clarification are necessary.

First, there are in fact many "feminisms."²⁶ By "feminism" I mean any theory that draws on the lives of women or seeks to emancipate them from oppressive social constraints imposed by gendered roles, rules, and expectations.²⁷ Here I adopt a "pragmatic postmodern

25. See *infra* text accompanying notes 38–41; see also Taslitz, *Feminist Approach Revisited*, *supra* note 7.

26. See, e.g., VALERIE BRYSON, *FEMINIST POLITICAL THEORY: AN INTRODUCTION* (1992) (tracing history of differing schools of feminist political thought); JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* (exp. ed. 1992) (contrasting the intellectual roots of liberal, cultural, Marxist, Freudian, existential, and radical feminisms); ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1988) (articulating the different views of human nature underlying liberal, Marxist, socialist, and radical feminisms). Professor Orenstein identifies two broad schools of feminist thought as having the richest traditions: "difference" and "dominance" feminisms. See Orenstein, *My God!*, *supra* note 15, at 184–91. "Difference" feminism posits that, either because of nature or nurture, women perceive and think about the world differently than men. See Orenstein, *My God!*, *supra* note 15, at 184. "Dominance" feminism focuses on the power differential between men and women and the processes by which the former subjugate the latter. See Orenstein, *My God!*, *supra* note 15, at 187. Rather than choosing between these schools, Professor Orenstein views both as valuable, shedding light on different aspects of gendered problems. See Orenstein, *My God!*, *supra* note 15, at 188–91. I follow a similar approach here. To avoid awkward constructions, when I defend a "feminist" approach hereinafter, I am referring specifically to my brand of pragmatic postmodern feminism and do not mean to imply that there is a unitary "feminist" viewpoint.

27. This definition follows from the fusion of the insights of both "difference" (learning from women's lives) and "dominance" (focusing on male power) schools of feminism discussed *supra* note 26. This fusion incorporates the idea of "patriarchy, a social sys-

feminism." By this term I mean, in part, that I have sympathy for many of the lessons of postmodernism: that power and knowledge are intertwined; that we discursively (that is, in language) create, rather than discover, objects of knowledge; that the self is partly a permeable, social creation; and that much knowledge is local or contextual, rather than universal.²⁸ But I adopt postmodern insights only to the extent

tem that privileges male over female power in spheres of endeavor our society values highly." Taslitz, *Patriarchal Stories*, *supra* note 15, at 394. Patriarchy is fundamentally "a system of meaning, a way of organizing and understanding the world." Taslitz, *Patriarchal Stories*, *supra* note 15, at 402. One commentator put it thus:

Patriarchy, as defined by feminists, is the process of using the system of male supremacy found in traditional families (i.e., the "father's house") as a paradigm for the world order. Patriarchy is a system in which men create the definitions of power, the ways to maintain power, and the avenues for obtaining power in all of its forms. . . . Patriarchy then goes on to place . . . socially constructed and exaggerated differences into a hierarchy where those qualities associated with maleness are valued most.

RUS ERVIN FUNK, STOPPING RAPE: A CHALLENGE FOR MEN 29-30 (1993). Importantly, this definition does not deny that men can suffer under patriarchy (for example, as the frequent victims of their own violence) or that women can have forms of power. However, the power society values most will disproportionately be the male's.

28. See, e.g., SUSAN J. HEKMAN, GENDER AND KNOWLEDGE: ELEMENTS OF A POSTMODERN FEMINISM 4, 185 (1990) (noting postmodernism's rejection of universal, foundational "metanarratives" in favor of a recognition of the "local and contextual" analysis of dominance and the "interpretive character of all human knowledge"); Diana Tietjens Meyers, *Introduction*, in FEMINISTS RETHINK THE SELF 1-3 (Diana Tietjens Meyers ed., 1997) (contrasting the more permeable, relational self of much feminist theory, including postmodern feminism, with "*homo economicus*—the free and rational chooser . . . isolate[d] . . . from personal relationships and larger social forces"); ROBIN WEST, CARING FOR JUSTICE 259-76 (1997) (discussing the power/knowledge connection and the discursive creation of knowledge). Robin West questions both postmodernism's recognition that power is not necessarily repressive (arguing that *patriarchal power* always is oppressive) and its emphasis on discourse (arguing that patriarchy primarily produces *silence* from women). See WEST, *supra* at 259-76. Regarding the first point, I note only that many postmodern theorists do recognize and explain how power is used to oppress women, and, in any event, women can benefit from an awareness of the liberating possibilities of their own power. See, e.g., HEKMAN, *supra*. Regarding the second point, I agree with Andrew Vogel Ettin that, "[a]mid oppression, both language and silence are potential means to integrity and means of self-defense—tools and weapons." ANDREW VOGEL ETTIN, SPEAKING SILENCE: STILLNESS AND VOICE IN MODERN THOUGHT AND JEWISH TRADITION 12, 169-86 (1994) (citation omitted). More importantly, a focus on discourse reveals the mechanism by which men silence women. See TASLITZ, CULTURE OF THE COURTROOM, *supra* note 15.

that they are useful.²⁹ I therefore reject the most extreme, perhaps caricatured, versions of postmodernism in which reality is seen solely as the vision imposed by the most powerful group.³⁰ And I believe, or at least find it useful to behave as if I believe,³¹ in some absolutes, such as the fundamental dignity of all persons. I thus reject the dichotomy between modernism and postmodernism, finding the insights of each more or less useful for different purposes.³² I am pragmatic in a final way, as well: in my willingness to find truth in the fact-based particularity of life.³³

29. See generally CHARLENE HADDOCK SIEGFRIED, *PRAGMATISM AND FEMINISM: REWEAVING THE SOCIAL FABRIC* (1996) (linking pragmatism and feminism because they both locate emancipatory potential in everyday experience).

30. See GROSS & LEVITT, *supra* note 15, at 11–12 (describing postmodernism).

31. See LOYAL RUE, *BY THE GRACE OF GUILE: THE ROLE OF DECEPTION IN NATURAL HISTORY AND HUMAN AFFAIRS* (1994) (arguing that social and individual survival require that we deceive ourselves about some of the great questions of politics and morality).

32. See WEST, *supra* note 28, at 292 (critiquing aspects of postmodernism but approving its skepticism as perfectly consistent with a non-postmodern, essentialist alternative to Enlightenment visions of human nature); see also DAVID S. CAUDILL, *LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY* at xii (1997) (arguing “[t]he extreme positions in these debates—like the belief in objectivity or the belief that all knowledge is illusory—are less than helpful, as are the exaggerated caricatures of traditional thinkers as ideologues or postmodern thinkers as nihilists. . . . [T]he most helpful cultural criticism takes place between the extremes in contemporary debates over postmodernism . . .”). I am, therefore, more concerned with what is persuasive and effective than with what is consistent in modern or postmodern world views. Thus, I sometimes cite such traditional thinkers as Immanuel Kant to support a chain in an argument ultimately leading to postmodern insights. Compare MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 11–12 (1996) (explaining Kant’s traditional, atomistic notion of the self), with *infra* text accompanying notes 47–94 (explaining why Kant’s definition of “mind” is consistent with more permeable notions of the social self).

33. See SIEGFRIED, *supra* note 29. I spend time explaining that my approach is neither rigidly modernist nor rigidly postmodernist to fend off a type of critique that I find illegitimate: a theory is flawed precisely because it is inconsistent with one type of world view or the other. I find things of value in both world views, and my arguments should be accepted or rejected based on their persuasive force apart from whether I fit in any particular ideological camp. On the other hand, I find that postmodernist ideas are often unfairly caricatured and belittled in the hallway conversations of evidence conferences. In these conversations postmodernism’s diversity is ignored, and the mere label “postmodern” is deemed sufficient to debunk an idea. That too seems wrong. The ideas should be judged on their merit. By allying myself in some ways with postmodern theorists, therefore, I seek to give them their due. My goal is thus to acknowledge my equal debt to two different intellectual movements and to ask the reader to take seriously the modern and postmodern theorists on whom I rely. Judge the worth of their ideas and mine, regardless of the camp to which we belong.

In this Article I do not attempt a comprehensive philosophical defense of the pragmatic postmodern version of feminism that I articulate here. My goal here is more concrete—to illustrate how such a feminism might lead to very different conclusions about the admissibility of some social science evidence than does *Daubert*.³⁴ More precisely, I am interested not so much in *Daubert* itself as in its underlying epistemological and political assumptions, its evidentiary “attitude.” That attitude has implications far beyond *Daubert*’s specific holding.

I also want to re-emphasize that the scope of my task is to articulate a feminist evidentiary vision where mental state is at stake in a criminal trial. Thus, proving the mental element of the prosecution’s case-in-chief—purpose, knowledge, recklessness, cold blood, heat of passion, and non-consent—all fit within this enterprise. This enterprise also includes evidence concerning mental states essential to defenses, whether derivative or affirmative. Mistake of fact, belief in the necessity of using deadly force in self-defense, insanity, and aspects of duress are all included.³⁵ That inclusion extends to certain uses of syndromes, profiles, and other “group character evidence” when offered to prove mental state.³⁶ It is, therefore, in defining “mental state” that this Article’s argument begins.

34. Importantly, I must stress that I do not adopt or defend any of the particular theories of feminist science or epistemology surveyed in the sources I cite *supra* note 15. Indeed, I am often more concerned with other types of feminist theorists whose work has more direct relevance to *law*, for it is a revision of law’s conception of science in certain contexts, not of science itself, for which I argue here. Moreover, I draw on many theorists, both male and female, whose work is not necessarily feminist, yet which supports feminist insights. For those who question whether men can offer anything of value to feminism, see *WHO CAN SPEAK? AUTHORITY AND CRITICAL IDENTITY* (Judith Roof & Robyn Wiegman eds., 1995); ALICE JARDINE & PAUL SMITH, *MEN IN FEMINISM* (1995).

35. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (2d ed. 1996) (defining these terms). While my focus is on mental-state determination, the theory presented here and in the companion piece is a comprehensive one for the use of social scientific evidence in court: use special standards for admitting social science evidence regarding mental state, but mainstream standards where social science evidence is offered for other purposes. See *infra* notes 117–42 and accompanying text.

36. See *infra* text accompanying notes 109–27.

I. MENTAL STATE AS AN INTERPRETIVE ACTIVITY

The understanding that mental state is partly a self-conversation, a linguistic event, is the keystone to my argument. Part I explains the central implication of this insight, namely, that mental state is a socially-constructed *interpretation* rather than a pre-existing reality. Fully appreciating this point requires understanding in turn that the "self" as an isolated individual is a fiction—for our "selves" are social notions tied to our cultural and group connections.³⁷ Knowing our self-conversations (mental states), therefore, requires knowing much about our social position. But mental-state determination ultimately and unavoidably involves the jury in that conversation. Thus, we need a conception of the proper role of the jury in that task, an idea developed in Parts II and III of this Article. Along the way, Part I addresses whether the notions of confused and unconscious thinking create problems for the idea of mind as self-conversation, concluding that these notions are in fact not problems at all. Part II then explores more fully the implications of Part I's argument that mind is partly self-conversation ("autologue") and that the "self" is a social, relational concept. Parts III through V finally conclude by exploring the necessary epistemological and political implications for evidence law of viewing mental states as interpretations.

A. Mind as Autologue

1. Universal Truth: The Realist Assumptions of Evidence Law

Feminist theory associates the idea of a single, objective, universal truth with androcentrism, i.e., male centeredness.³⁸ Such a notion of truth separates the subject and object of study, with the former being

37. See *infra* text accompanying notes 67–94.

38. See, e.g., HEKMAN, *supra* note 28, at 62–65; Orenstein, *My God!*, *supra* note 15, at 189; see also SANDRA LIPSETZ BEM, *THE LENSES OF GENDER* 2 (1993) ("[A]ndrocentrism or male-centeredness . . . is . . . [the] definition of males and male experience as a neutral standard or norm, and females and female experience as a sex-specific deviation from that norm. . . . [M]an is treated as human and woman as 'other.'").

irrelevant to the nature of the latter.³⁹ Rephrased, the observer does not alter the observed nor interact with it to create a "truth."⁴⁰

Feminist theory challenges this notion of an objective truth waiting to be discovered—viewing knowledge as situated and affected by context, which includes the nature of the subject or observer.⁴¹ Indeed, the observer and the observed are so closely intertwined that they cannot clearly be kept distinct; the subject/object dichotomy breaks down.⁴² Furthermore, to the extent that we can speak of a subject, the subject's knowledge is possible only in relationship to others.⁴³ It is therefore important to understand knowledge in community, rather than focusing simply on a supposed isolated knower.⁴⁴

39. See Sandra Harding, *Rethinking Standpoint Epistemology: What Is "Strong Objectivity"?*, in *FEMINISM & SCIENCE* 235, 243 (Evelyn Fox Keller & Helen E. Longino eds., 1996).

40. See LORRAINE CODE, *RHETORICAL SPACES: ESSAYS ON GENDERED LOCATIONS* 51 (1995) [hereinafter CODE, *RHETORICAL SPACES*] (rejecting the "traditional paradigms" that picture objects as permanent and distinct from subjects, in favor of a vision of knowledge as involving "negotiations between knower and known"); ROBERT KLEE, *INTRODUCTION TO THE PHILOSOPHY OF SCIENCE* 47–53 (1997) (concluding that while the "observational/theoretical" distinction—the idea that we can make observations of the world apart from our unobservable, theoretical models of that world—is vague, it "has produced a remarkably accurate epistemological track record in science over the last 300 years").

41. See LORRAINE CODE, *WHAT CAN SHE KNOW? FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE* 1–26 (1991) [hereinafter CODE, *WHAT CAN SHE KNOW?*] (arguing that the sex of the knower matters); HARDING, *WHOSE SCIENCE?*, *supra* note 15, at 119–20 (discussing feminist standpoint epistemology and recognizing that knowledge is socially situated); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 97–105 (1989) (asserting that feminism rejects "objectivity"). Objectivity claims that, "[t]o perceive reality correctly, one must be distant from what one is looking at and view it from no one place and at no time in particular, hence from all places and all times at once." MACKINNON, *supra* at 97.

42. See HEKMAN, *supra* note 28, at 62–65 (discussing the impact of the postmodern rejection of the subject/object dichotomy in feminist theory); see also KLEE, *supra* note 40, at 158.

43. See CODE, *WHAT CAN SHE KNOW?*, *supra* note 41, at 121 (raising the idea of "knowledge as a communal, often cooperative . . . activity [K]nowledge claims are . . . speech acts, moments in a dialogue that assume and indeed rely on the participation of (an)other subject(s) . . ."); LINDA JEAN SHEPHERD, *LIFTING THE VEIL: THE FEMININE FACE OF SCIENCE* 11–12, 24, 124, 131, 225–29 (1993) (stressing the role of inter-relatedness in feminine knowing).

44. See generally sources cited *supra* notes 41–43. There are three broad types of feminist approaches to science: (1) "feminist empiricism," stressing stricter adherence to traditional scientific norms as a way of overcoming sexism; (2) "feminist standpoint" epistemology, arguing that women's standpoint in reality is less partial and perverse than men's; and (3) "feminist postmodernism," holding powerful skepticism about traditional notions of reason. HARDING, *SCIENCE QUESTION*, *supra* note 15, at 24–

Moreover, the idea of a single, universal truth cloaks other valid perspectives, thus silencing the female voice. There can be multiple "truths" without sliding into relativism or nihilism.⁴⁵

Mainstream philosophy of science has, of course, long adopted more moderate versions of these insights. Most mainstream thinkers would agree that observation can alter what is observed.⁴⁶ They would further agree that different theories can explain the same data, so theory choice/creation is at least partly a socially constructed reality. Additionally, these thinkers understand that an observer's prejudices and historical setting can skew both theory and observation, leading to "bad" science.⁴⁷

But mainstream thought views these matters largely as cautions helpful in doing traditional science more effectively. There is still an objective reality waiting to be discovered, an object of study separate and apart from the knowing subject. While relationships and scientific communities affect how knowledge is produced, we can and should strive to discover knowledge of the objective world that is more than simply the social constructions of our communities.⁴⁸ Mainstream theorists thus recoil from the permeable, relational, socially constructed world of feminist epistemologists, decrying them all as dreaded, closeted relativists.⁴⁹

28. Yet even feminist empiricism, the most conservative of these three theories, draws insights from postmodernism, *see* HARDING, *SCIENCE QUESTION*, *supra* note 15, at 25, and recognizes knowledge as a communal, not individual, endeavor. *See* KLEE, *supra* note 40, at 201.

45. *See* HERMAN, *supra* note 28, at 63–64.

46. *See, e.g.*, DAVID FAUST, *THE LIMITS OF SCIENTIFIC REASONING* 13 (1984) (noting that the key underlying questions in scientific observation include: "We know we alter what we measure, but what forms of alteration can be expected, which can be avoided, and how can we avoid them?").

47. *See* KLEE, *supra* note 40, at 64–67, 159–63; Susan Haack, *Towards a Sober Sociology of Science*, in *THE FLIGHT FROM SCIENCE AND REASON* 259, 259–64 (Paul Gross et al. eds., 1996).

48. *See* KLEE, *supra* note 40, at 64–67, 177–79, 188–89, 207–37.

49. *See* KLEE, *supra* note 40, at 73–92, 188–89. I emphasize that I take no position on who is "right" regarding knowledge of the physical world in the debate between mainstream and feminist philosophers of science. Indeed, I concede much to mainstream thinkers in the discussion to follow regarding knowledge of the physical world. My conclusions sympathetic to the various feminist arguments concern only knowledge of the mental states relevant in a criminal trial, *not* in the physical world. I draw on many sources beyond the philosophy of science, however, for thinkers in wider areas of concern in both feminism and the philosophy of mind have much to offer concerning knowledge of mental states. My primary task—to illustrate how feminist insights would change our treatment of expert testimony regarding mental

Yet evidence law similarly, although often properly, commonly assumes that there is a single truth "out there."⁵⁰ That "Johnny stabbed Ritchie" is either true or false, regardless of whether the fact-finder chooses the correct answer. If we cannot make such statements, then we cannot speak of injustice in the sense of Johnny's being falsely convicted for the act of another.⁵¹ Evidence law thus shares the realist assumptions of mainstream philosophy of science.

2. Anti-Realism and the Literary Mind

Realist assumptions make no sense when the question at issue is mental state: "What was in Johnny's *mind* when he stabbed Ritchie?" Among the many competing definitions of "mind" in philosophy are mind as behavior, mind as brain, mind as computer.⁵² But these conceptions are not those of the criminal law. We cannot offer evidence of biochemical reactions in Johnny's brain or of the sequencing of his neural processors to prove that he had the "purpose" to kill. The law instead adopts a linguistic notion of mind, mind as self-conversation.

states in criminal trials—does not require me to defend in detail the position of any particular thinker.

50. See WILLIAM TWINING, *RETHINKING EVIDENCE* 32–91 (1990) (explaining the "rationalist" epistemology of traditional evidence law and scholarship).

51. See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 12–13 (1993). *Daubert* illustrates this sort of realist evidentiary thinking. *Daubert* involved the question of whether Bendectin caused a birth defect. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). That question of biochemical causation necessarily partly involved a realist epistemology, an assumption of an objectively true answer waiting to be discovered. Leading evidence scholars agree that the test articulated in *Daubert* indeed involved realist assumptions. See Faigman, *Social Science*, *supra* note 6, at 969. It might be that *Daubert* involved realist assumptions only because the context before the Court demanded it, and in a different context, the Court might reject realism. But leading scholars, see, e.g., Faigman, *Social Science*, *supra* note 6, have not so narrowly interpreted *Daubert*. I take issue with the wisdom of their reading of that case.

I concede, however, that *Daubert's* realism makes sense in proving physical facts but *not* in proving mental state. In doing so, I do not want to oversimplify. Interpretation is involved in the effort to discover the physical fact of whether Johnny stabbed Ritchie and in our ability to determine the answer to that question. Yet the answer itself has a real physical existence: either Johnny did that stabbing or someone else did. But Johnny's mental state—for example, whether he did the stabbing under "extreme emotional distress" or in fear for his life—literally is an interpretation (although various realist facts such as when he bought the knife and what he told the police may guide that interpretation). Where an interpretation is the reality, *Daubert's* ontology and epistemology fail as useful guides for evidence law.

52. See JAEGWON KIM, *PHILOSOPHY OF MIND* (1996) (surveying current theories of the philosophy of mind).

We expect to prove that Johnny said to himself (thought), "I'm going to kill you!"⁵³ We believe that Johnny thinks this thought when we prove that he had the purpose, the want, the desire to kill Ritchie.⁵⁴

Mind as self-conversation—as a linguistic process or activity—is a concept whose lineage goes back to Plato. In the *Theaetetus*, Plato wrote of this conversation between Socrates and an interlocuter:

SOCRATES: . . . And do you accept my description of the process of thinking?

THEAETETUS: How do you describe it?

SOCRATES: As a discourse that the mind carries on within itself about any subject it is considering. . . . [W]hen the mind is thinking, it is simply talking to itself. . . . So I should describe thinking as discourse, and judgment as a statement pronounced, not aloud to someone else, but silently to oneself.⁵⁵

Kant similarly wrote that "[e]veryman . . . thinks of the cadaver, which is no longer himself, as himself in the shadowy grave or somewhere else. This illusion cannot be dispelled: it lies in the nature of thinking as a talking to and about oneself."⁵⁶

Our common sense ideas of mind are similarly linguistic. We have a huge vocabulary of ways to talk to ourselves—believing, medi-

53. See THOMAS SZASZ, *THE MEANING OF MIND: LANGUAGE, MORALITY, AND NEUROSCIENCE* (1996) (defending the idea of mind as self-conversation).

54. See MODEL PENAL CODE § 2.02 (defining purpose); see also SZASZ, *supra* note 53, at x (arguing that "mind" as self-conversation is the definition most consistent with how we use the term "mind" in ordinary discourse, law, and psychiatry). Daniel Dennett concedes that "our kind of mind" is linguistic, but argues that animals and infants, for example, have less sophisticated "other kinds of minds" or "protominds." See DANIEL C. DENNETT, *KINDS OF MINDS: TOWARD AN UNDERSTANDING OF CONSCIOUSNESS* 1–18, 41–49, 130–33, 146–56, 162 (1996). The only appropriate object of our knowledge and what is at issue in a criminal trial is our kind of mind—the linguistic mind. Dennett also points out that the ontology (what is)/epistemology (our ability to know what is) distinction collapses in discussions of mind, for how we know our thoughts affects what they are. See DENNETT, *supra* at 2–3. That is why I have made no special effort to stress this distinction here.

55. Plato, *Theaetetus*, in *THE COLLECTED DIALOGUES OF PLATO* (Lane Cooper et al. trans.) 895–96 (1973).

56. SZASZ, *supra* note 53, at 19 (quoting Immanuel Kant, *Von Erkenntnisvermögen* ("Power to know"), in 11 "I. Kant" Werke in 12 Banden 465, 500 (ed. Wilhelm Weischedel 1964)).

tating, musing, reflecting, pondering, surmising.⁵⁷ When we keep secrets, we keep our internal conversation to ourselves.⁵⁸ We, therefore, do not attribute moral agency to those who cannot speak coherently, to infants, or to the demented, for we do not see them as having a mind.⁵⁹ Similarly, in law, one is responsible for one's conduct only if "answerable" for it.⁶⁰ We are answerable to others and to ourselves, or more specifically, to our conscience. Remorse, for example, is our inner voice of the self as wicked.⁶¹ We treat those who cannot coherently answer as mindless and therefore not responsible. *Mens rea* should thus best be viewed as involving the answering, speaking mind.⁶²

Feminists, however, rarely speak expressly about mind as self-conversation.⁶³ Rather, feminist debate has centered around an analogous question: whether language determines, or at least strongly influences, thought.⁶⁴ Professor Deborah Cameron has summarized one representative feminist school of thought thus:

Many feminists have made the claim that the names we give our world are not mere reflections of reality, nor arbitrary labels with no relation to it. Rather, names are a culture's way of fixing what will actually count as reality in a universe of overwhelming, chaotic sensations, all pregnant with a multitude of possible meanings.⁶⁵

This statement effectively defines mind as "autologue," i.e., self-conversation.

57. See SZASZ, *supra* note 53, at 14.

58. See SZASZ, *supra* note 53, at 9.

59. See SZASZ, *supra* note 53, at x.

60. See SZASZ, *supra* note 53, at 26.

61. See SZASZ, *supra* note 53, at 47.

62. See SZASZ, *supra* note 53, at 39.

63. See, e.g., DEBORAH CAMERON, *FEMINISM & LINGUISTIC THEORY* (2d ed. 1992) [hereinafter CAMERON, THEORY]; *THE FEMINIST CRITIQUE OF LANGUAGE* (Deborah Cameron ed., 1990) [hereinafter CAMERON, LANGUAGE].

64. See, e.g., CAMERON, THEORY, *supra* note 63, at 134-57 (summarizing the debates); DAVID GRADDOL & JOAN SWANN, *GENDER VOICES* 134-73 (1992) (discussing the language/thought/social-reality connection); Maria Black & Rosalind Coward, *Linguistic, Social, and Sexual Relations: A Review of Dale Spender's Man Made Language*, in LANGUAGE, *supra* note 63 (critiquing leading feminist text on language-thought connection).

65. Deborah Cameron, *Introduction: Why is Language a Feminist Issue?*, in LANGUAGE, *supra* note 63.

Even other versions of the feminist viewpoint generally agree that language *shapes* thought, even if not rigidly determining it. Under such a view, language does not equal thought but is inextricably bound up in it.⁶⁶ We cannot, therefore, know our own thoughts without language. For the practical purposes of the law, this means that even if "mind" does not literally equal self-conversation, without the latter we cannot understand the former.

B. The Self: A Relational Text

The terms mind, person, and self are related and sometimes used interchangeably. If we think of mind as a *self*-conversation, we must therefore define the "self" as well. The "self" is often explained in

66. See, e.g., CAMERON, *THEORY*, *supra* note 63, at 138 ("Absolute determinism is easily refuted, but the weaker claim that we are influenced by language structure remains . . . of interest."); GRADDOL & SWANN, *supra* note 64, at 155 ("[T]hat language 'determines' rather than 'influences' thought is surely discredited. But . . . there is some kind of link between the way language is used and the way people think and react."). For an assessment of the empirical data that abstract language structures (such as grammar) influence thought, see JOHN A. LUCY, *LANGUAGE, DIVERSITY, AND THOUGHT: A REFORMATION OF THE LINGUISTIC RELATIVITY HYPOTHESIS* (1992) (accepting that language has at least *some* influence on thought, but finding inadequate evidence as to what are its influences, how important they are, and when and how they operate). For a convincing argument that language structures and language use (e.g., interruption patterns) shape thought and perceptions, see MICHAEL AGAR, *LANGUAGE SHOCK: UNDERSTANDING THE CULTURE OF CONVERSATION* 61-72, 77-79, 87, 120-22 (1994). Some theorists view ideology, as expressed in language, as the primary way in which language influences thought. See, e.g., NORMAN FAIRCLOUGH, *LANGUAGE AND POWER* 2-5, 33-37 (1989). Some researchers flatly reject "Whofianism"—the idea that language influences thought—arguing that we all share a "language instinct," certain biologically-based, universal cognitive-linguistic concepts, so that language variation has little influence on our thoughts. See, e.g., STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW MIND CREATES LANGUAGE* 55-82 (1994). But see EDWARD M. HUNDERT, *LESSONS FROM AN OPTICAL ILLUSION: ON NATURE AND NURTURE, KNOWLEDGE AND VALUES* 12-19, 30, 41, 134-36, 167-70 (1995) (refuting the language instinct theorists by demonstrating a dialogic relationship between biology, on the one hand, and culture/language on the other). Apart from empirical data, many philosophers view language and thought as inseparable, see, e.g., JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 1-70, 95-145 (1995) (at least some facts cannot exist without the human institution of language); JOHN STEWART, *LANGUAGE AS ARTICULATE CONTACT: TOWARD A POST-SEMIOTIC PHILOSOPHY OF COMMUNICATION* 3-32, 103-30 (1995) (language literally constitutes our world); Martin Heidegger, *Letter on Humanism*, in *BASIC WRITINGS* 193 (David F. Krell ed., 1977) ("Language is the house of Being. In its home [the hu]man dwells."), a view consistent with the philosophy of mind articulated here.

terms of both form and function.⁶⁷ "Form" concerns the laws governing nonmental or material processes, the realm of determinism.⁶⁸ "Function" concerns the phenomenal experiences of consciousness and choice, the realm of agency and individual uniqueness.⁶⁹ Karl Jaspers has described a similar notion as the tension between "understanding" and "explanation."⁷⁰ Our notions of political freedom and citizenship underlying our criminal law indeed depend on the primacy of function over form, on the assumptions of individual uniqueness and free will.⁷¹ But, we have seen, our willingness to assume freedom of choice and thus accompanying moral responsibility turns on our capacity for coherent self-conversation.⁷² Therefore, both "mind" and "self" ultimately turn on language.

The primary consequence of mind as rooted in language is that language—and thus both "mind" and the "self"—involves interpretation. In the first instance, thoughts are acts of self-interpretation. All our experiences are partly constituted by interpretive assumptions: our expectations, memories, beliefs, desires, and cultural prejudices.⁷³ A small woman walking down a darkened city street has a very different experience from that of a heavyweight male boxer walking down the same street.⁷⁴ Memory itself is an assertion, a self-report, which we play an active role in constructing.⁷⁵ Our memories never involve solely historical truths, for we seek to create an account of the past consistent with a preconceived cognitive or moral scheme.⁷⁶ Memory

67. See DONALD ALEXANDER DOWNS, *MORE THAN VICTIMS* 44–45 (1996).

68. See DOWNS, *supra* note 67, at 44–45.

69. See DOWNS, *supra* note 67, at 44–45.

70. KARL JASPERS, *GENERAL PSYCHOPATHOLOGY* 302–03 (J. Hoenig & Marian W. Hamilton trans., 1963).

71. See DOWNS, *supra* note 67, at 45. Downs also stresses the flip side of free will—responsibility, which requires a careful balance in the criminal law between individualization and more general standards of reasonableness. See DOWNS, *supra* note 67, at 182–250. In evidence law terms, he argues for individualized, rather than group, justice by placing women defendants' lives in their social and experiential context and then judging them as fully rational human beings. See DOWNS, *supra* note 67, at 198–219, 225–31. For a discussion of the role of individualized justice in evidence law more generally, see Taslitz, *Myself Alone*, *supra* note 23, at 14–30.

72. See *supra* text accompanying notes 57–62.

73. See BRIAN FAX, *CONTEMPORARY PHILOSOPHY OF SOCIAL SCIENCE* 12–17 (1996).

74. See FAX, *supra* note 73, at 13.

75. See SZASZ, *supra* note 53, at 47–51.

76. See SZASZ, *supra* note 53, at 49–51.

is thus at least partly a created narrative.⁷⁷ "The dependence of memory on language is consistent with the fact that we have no memories of our infancy and begin to remember when we begin to talk."⁷⁸

The interpretive nature of our thinking extends to emotions as well. Fear, for example, is both a thought and a feeling.⁷⁹ The feeling

77. See SZASZ, *supra* note 53, at 50 ("Memory . . . is a narrative we create—and from time to time, re-create or 'correct' . . . to give permanence and validity to our sense of identity and justify our plans for the future.").

78. See SZASZ, *supra* note 53, at 52.

79. See SZASZ, *supra* note 53, at 110–11. This observation seems counterintuitive. Emotions seem to sweep over us without our control, forces external to ourselves that capture us in their urgency. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 279–80 (1996). This intuition seems best explained by a mechanistic account of the emotions as "impulses," "drives," or "unreasoning movements,"—"feelings" unconnected to thinking. See Kahan & Nussbaum, *supra* at 278. Indeed, even pre-verbal infants seem to us to feel fear, though they lack "thoughts" in the linguistic sense described here.

Few modern philosophers or psychological researchers find the mechanistic view plausible. See Kahan & Nussbaum, *supra* at 284. Some modern, well-respected mavericks, such as philosopher Paul E. Griffiths, do nevertheless find a core of truth in the mechanistic view. Griffiths argues that there are a small number of "affect program" emotions, emotions that involve facial expressions and autonomic nervous system reactions unique to those emotions. PAUL E. GRIFFITHS, *WHAT EMOTIONS REALLY ARE* 77–78, 83 (1997). Yet, even he concedes that there is often a cognitive component in the sense that one affect program emotion, fear, is a response to danger, so we often must first decide that we face danger in order to feel fear. GRIFFITHS, *supra* at 89, 92. Sometimes we bypass this evaluative process because we have learned from past experience to feel fear in a particular situation, despite our present understanding that there is no danger. See GRIFFITHS, *supra* at 92–95. But this observation itself demonstrates that culture and socialization can play a role even in affect program emotions. More importantly, our higher cognitive emotions, such as disgust, love, or loyalty, are motivational patterns derived from goals, patterns that combine biological, cultural, and experiential factors. See GRIFFITHS, *supra* at 100–01, 104, 118, 120–21, 132–36. Additionally, many lay people describe some emotions as, for example, anger, when they are experiencing a higher cognitive emotion and not the affect program emotion of anger. See GRIFFITHS, *supra* at 100–01. Furthermore, some emotions are socially constructed in the sense that they are actions reinforced by culture or pretenses that mimic other emotions. See GRIFFITHS, *supra* at 137–67. Even Griffiths concedes, therefore, strong cognitive and cultural components to most of our emotions.

A better conception of emotions is "evaluative." Under this conception, thoughts about an object are integral to emotions. See Kahan & Nussbaum, *supra* at 285–97. We cannot, therefore, feel grief without mentioning the object toward which it is directed. Thus grief must stem from a belief, such as a woman's belief that her child is dead. See Kahan & Nussbaum, *supra*. All such beliefs involve appraisals of the object as significant or valuable. See Kahan & Nussbaum, *supra*. That recognition of the object's importance to us explains the sense of externally imposed urgency that we associate with emotions. See Kahan & Nussbaum, *supra* at 288–89. Moreover, the beliefs are a constituent part of the emotions, for "[t]o separate pity from fear, fear

or physiological experience involves a quickened heart, a racing pulse, a sweating brow. But is this experience excitement, anticipation, fear, or a combination? We identify it as fear when we name it. Experience and knowledge of our thoughts and feelings are thus not the same thing.⁸⁰ We "know" something only when we can identify, describe, and explain it.⁸¹ Knowledge involves being able to say something about the object of that knowledge.⁸² Consequently, every feeling and thought must be interpreted.⁸³

But such interpretation is an inherently social act. The isolated, autonomous self of liberal individualism does not exist.⁸⁴ Take a child's learning the simple distinction between an "apple" and a

from grief, we cannot rely on the felt quality of the pain alone; only an inspection of the characteristic thought patterns allows us to discriminate." Kahan & Nussbaum, *supra* at 293. To recognize that emotions necessarily have evaluations as a constituent component is not to deny, however, that habit and biology play roles as well. See Kahan & Nussbaum, *supra* at 296.

The evaluative view is also at work in both the theory and practice of the criminal law, although often alongside the mechanistic view. See Kahan & Nussbaum, *supra* at 304–46. As one example, common law manslaughter requires not simply provocation but provocation *by the victim*. See Kahan & Nussbaum, *supra* at 306. The jury must thus make a determination that the defendant's passion was directed toward a particular object, a cognitive component of the emotion. Similarly, the common law might mitigate murder to manslaughter where a woman is provoked by her husband's abusing her daughter but not a killing provoked by homophobia, the type of perceived provocation (a cognitive matter) thus being key. See Kahan & Nussbaum, *supra* at 312–13. Furthermore, even where the law seems to ignore cognitive components of emotions, juries often will not do so. See Kahan & Nussbaum, *supra* at 330–31 (juries care about what kinds of thoughts prompt the fear involved in self-defense).

Finally, it is important to distinguish the experience of emotions from "knowing" them. As just explained, emotions can be a complex blend of physiological reaction, cognitive beliefs, individual experiences, social expectations, and cultural training. We cannot make sense of this mass of data without words, but coming up with the right words of course involves us in interpretation.

80. See FAX, *supra* note 73, at 18–19.

81. See FAX, *supra* note 73, at 20.

82. See FAX, *supra* note 73, at 19.

83. See FAX, *supra* note 73, at 18–19 ("Every experience is like a sign whose meaning must be derived from seeing how it is connected to other experiences Knowledge of what we are experiencing always involves an interpretation of these experiences.").

84. See WEST, *supra* note 28, at 281 ("[T]he particular 'self' familiar to modern, liberal society . . . [is] arbitrarily desirous, sated by pleasure, [and] sovereign over one's own subjectivity"); Susan J. Brison, *Outliving Oneself: Trauma, Memory, and Personal Identity*, in FEMINISTS RETHINK THE SELF, *supra* note 28, at 12, 14 ("Most traditional accounts of the self . . . have been individualistic, . . . independent of . . . social context").

"tomato." Both are round, red, and edible. To distinguish between them, the child must learn to attend to other differences as salient ones and to attach names to those differences.⁸⁵ That learning comes from family, friends, teachers, and caretakers, from the child's relationship to others.⁸⁶ If such basic concepts as "apple" and "tomato" are partly defined by others, this is even more so for more complex concepts relevant to self-identity. Whether we consider ourselves kind or grumpy, smart or average, religious or secular depends upon moral, intellectual, and spiritual concepts learned from others.

Susan Brison put it this way:

[F]eminist accounts of the self have focused on the ways in which the self is formed in relation to others and sustained in a social context. On these accounts, persons are, in Annette Baier's words, "second persons"—that is, "essentially successors, heirs to other persons who formed and cared for them." . . . [T]he self . . . [is] related to and constructed by others . . . not only because others continue to shape and define us throughout our lifetimes but also because our own sense of self is couched in descriptions whose meanings are social phenomena.⁸⁷

The self, however, exists not merely in relation to other individuals but to groups and institutions. The fluid self is so permeable that others are in fact part of you.⁸⁸ Indeed, our most common intentions depend upon others. You cannot intend to marry without the social institution of marriage, nor feel shame but in a real or imagined relationship to others.⁸⁹ You cannot intend to steal without the institution

85. The example is my own but is suggested by KIM, *supra* note 52, at 193–94, which discusses the related, albeit still different, notion of "wide content": most of our beliefs and desires depend partly upon the external world, involving more than simply what goes on in our heads.

86. See FAX, *supra* note 73, at 30–48 (critiquing "atomism," which is the thesis that the basic units of social life are self-contained, essentially independent, and separated entities).

87. Brison, *supra* note 84, at 14. Brison goes on to argue that even autonomy can be conceived in relational terms and that autonomy, embodiment, and narrative are but different aspects of the self. See Brison, *supra* note 84, at 14–32.

88. See FAX, *supra* note 73, at 39.

89. See FAX, *supra* note 73, at 39–41; SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, & RESPONSIBILITY* 141 (1996) ("Since the feeling of exposure is so central to the experience of shame, one can understand Helen Block Lewis's assertion that an individual can only experience shame in the context of an emotional

of property.⁹⁰ Thus, most intentions come from social practices.⁹¹ Furthermore, our social identity—our sense of who we are and what we are worth—is intimately bound up with our group memberships.⁹² Are we male or female? Black or white? Jewish or Christian? Republican or Democrat? Our attitudes, beliefs, and assumptions are thus in part shaped by the groups with which we identify.⁹³ Our self-interpretations therefore necessarily incorporate group interpretive schemes.⁹⁴

C. Can We "Know" Our Thoughts? The Problems of Confused Thinking and the Unconscious Mind

The interpretive act of determining our mental state is social in another sense: we often are not the only ones doing the interpreting. Often we do not know what it is we are thinking or feeling. We have trouble naming our thoughts and emotions. For example, is a decision to take a new job for you, or to please others, or both, and, if both, to what degree?⁹⁵ We also may not feel confident in assessing our own motives: "[T]o discover the nature of complex mental states requires subtle interpretation and a deep sense of the ways we often mislead ourselves to make ourselves look better."⁹⁶ We may be "too enmeshed

relationship with another person, and only when he or she values that other person's opinions.").

90. See FAX, *supra* note 73, at 40.

91. See FAX, *supra* note 73, at 41. Hegel powerfully captured the social nature of the related concept of self-consciousness as involving the "need for recognition": our sense of self turns on recognition by others. G.W.F. HEGEL, *THE PHENOMENOLOGY OF THE SPIRIT* (A.V. Miller trans., 1977); see also FAX, *supra* note 73, at 44–45 (explaining why even such primal feelings as desire are inherently social).

92. See RUPERT BROWN, *GROUP PROCESSES* 20 (1988).

93. See, e.g., RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 86 (1995) ("[S]tereotypes are rooted in the web of social relations between groups and do not derive solely . . . from the workings of our cognitive systems . . ."); PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* (1997) (summarizing criminal cases in which common group experiences and identity were central to understanding individuals' mental states); Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, 34 *STAN. L. REV.* 703, 717–18 n.73 (1980) ("[A] man never attacks a woman as an individual, nor does she ever respond as such.").

94. See generally JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997) (recounting the psychological processes by which white interpretive schemes mold racist perceptions and actions).

95. See FAX, *supra* note 73, at 18–20.

96. FAX, *supra* note 73, at 19.

in the flow" of our lives, too lacking in distance, to name our thoughts.⁹⁷ We may be ambivalent, desiring and spurning simultaneously, leaving us confused; we may deceive ourselves out of fear, guilt, or self-protection.⁹⁸ Thus, we may turn to others, who may offer insights that we lack due to their wider view and distance, to detect patterns, influences, and effects that escape us.⁹⁹

Yet this acknowledgement—that we may sometimes need to turn to others to divine our mental states—involves a subtle shift in my argument, a shift that has shown up periodically throughout this Article. If there are thoughts and feelings that we cannot name, then how can "mind" equal internalized talk? There must, therefore, be thoughts that do not involve language.¹⁰⁰

Several responses are possible. One is that experiences of discomfort or confusion are not thoughts but some other kind of mental phenomenon.¹⁰¹ We wrestle with these experiences until we come up with language to describe them, and it is that language that is a thought. A second response is to accept that there is such an entity as the unconscious mind.¹⁰² That entity manifests itself to us in dreams, images, vague feelings, slips of the tongue, and odd behaviors. Yet we cannot know what these signals mean without interpreting them, which means translating them into words.¹⁰³ This argument is a variation of the point made earlier that to experience something and to "know" it are two different things. We "know" only by naming.¹⁰⁴ A third response is to remember that feelings can involve both thought and nonthought elements, the former always involving language.¹⁰⁵ Each of these responses relies on one of two (or both) strategies: de-

97. FAX, *supra* note 73, at 21.

98. See FAX, *supra* note 73, at 21–22.

99. See FAX, *supra* note 73, at 21–24.

100. Cf. MARCIA CAVELL, *THE PSYCHOANALYTIC MIND: FROM FREUD TO PHILOSOPHY* 39, 174 (1993) (conceding that there may be some pre-verbal thoughts that are not fully formed, yet ultimately defending the idea that there are no "thoughts" in the strong sense of the word without language and that the "mind" is inherently social).

101. See COLIN MCGINN, *THE CHARACTER OF MIND: AN INTRODUCTION TO THE PHILOSOPHY OF MIND* 84 (2d ed. 1997) (proposing that thought as language can refer only to propositional attitudes, not to all mental states).

102. See KIM, *supra* note 52, at 158 ("[T]he existence of unconscious mental states, including beliefs, of which the subject is not aware, is now widely recognized."). But see SZASZ, *supra* note 53, at 111 (arguing that "the unconscious" is a fiction).

103. See CAVELL, *supra* note 100, at 174 (describing part of the psychoanalyst's task as helping the patient to render articulate those mental states that are not yet so).

104. See *supra* text accompanying notes 80–83.

105. See *supra* notes 79–83 and accompanying text.

fining away the problem or conceding its existence but noting that *interpretation* is nevertheless always involved under any theory of the mind. This last point is ultimately the one on which my argument depends. In any event, even those philosophers finding flaws with the idea of mind as an autologue concede that they have yet to offer anything better for the practical purposes that matter to most people.¹⁰⁶ Moreover, the concept of mind as internal talk is closest to our commonsense and legal notions.¹⁰⁷ For all these reasons, it is simpler and more practical to speak of mind as self-conversation. That conversation necessarily involves interpretation and words whose sounds we may sometimes hear only when others join in.

D. The Jury: Fusing Horizons

In criminal trials, this involvement of others in interpreting our complex mental states is both necessary and no longer a matter of choice. The jury,¹⁰⁸ not the defendant, decides what was in the defendant's "mind." Under an intentionalist theory of meaning, of course, the defendant has a single mental state that the jury must uncover.¹⁰⁹ But the passage of time and differences between the defendant's and the jurors' experiences necessarily mean that jurors must translate the defendant's actions into the jurors' own terms. Moreover, the defendant's acts will have effects that may have a different meaning for jurors than for criminal actors. Ultimately, therefore, jurors will create meaning from the interaction between author (suspect) and interpreter (jury).¹¹⁰ This is the central insight of Gadamerian hermeneutics.¹¹¹ The defendant's own intention must be plumbed because it

106. Professor McGinn, after cataloguing the strengths and weaknesses of the argument that thought is language, unsuccessfully struggles with the problem of then determining what thought and its building blocks, concepts, are. See MCGINN, *supra* note 101, at 106. Whatever they may be, they will require interpretation and translation into words. So for the practical purposes of the law, both self- and other-knowledge of the mind are linguistic.

107. See *supra* text accompanying notes 52–66.

108. The arguments in this Part also apply when the court acts as factfinder, i.e., in a bench trial. In arguments to be made later in this piece, however, I will argue for a feminist preference for jury, rather than judicial, factfinding, though much of the discussion here applies to both contexts. See *infra* Part III.

109. See FAX, *supra* note 73, at 138.

110. See FAX, *supra* note 73, at 142–47. The "author" of courtroom trial texts also includes, of course, the advocates through whom the suspect and others often speak.

111. See FAX, *supra* note 73, at 142–47.

defines the object toward which jurors will direct their interpretive energies, so there is some truth in intentionalism.¹¹² But meaning unavoidably is determined by a fusion between the conceptual worlds of the defendant and the jurors.¹¹³ When jurors name a mental state as "premeditation," "heat of passion," or a "belief in the imminent need to use deadly force in self-defense," they are crafting an interpretation that partly embodies their own assumptions, attitudes, and beliefs. Mental-state determination, therefore, ultimately involves other-conversation (between jury and defendant or victim) as well as self-conversation. *Knowing* a mental state thus involves a socially constructed, communal process, the implications of which are explored in Parts II through V below.

E. Tentative Conclusions

What are the consequences for expert testimony of viewing the determination of mental state as a linguistic, interpretive act, partly, in a sense, a communal literary event? If mental state is for all practical purposes an interpretation, will any interpretation do? And what, if anything, can experts offer that lay witnesses cannot? The mere mention of the literary raises specters of Professor Faigman's Dostoyevskian psychologist, the psychologist who purports to obtain his insights from fictional novels rather than the controlled scientific study of human nature.¹¹⁴ Must that specter haunt the courtroom?

More complete answers to these questions—especially those concerning how to screen implausible from plausible interpretations—must await later sections of this Article and its companion. For now, I will make six preliminary points: first, we must distinguish proving mental state itself from proving mental state as a reflection of physical reality; second, interpretation necessarily involves an understanding of the narrative coherence of human lives; third, because juries participate in constructing interpretive mental state, understanding experts'

112. See FAX, *supra* note 73, at 148–51.

113. See FAX, *supra* note 73, at 152–53; see also Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. LEGIS. 329 (1995) [hereinafter Taslitz, *Interpretive Method*] (providing an example of how the hermeneutic approach can be applied to written as well as human "texts").

114. See David L. Faigman, *The Syndromic Lawyer Syndrome: A Psychological Theory of Evidentiary Munificence*, 67 U. COLO. L. REV. 817, 821 n.10 (1996) (likening some aspects of social science to literature and suggesting that "the work of Feodor Dostoevsky was at least as scientific as much Freudian-based psychology").

roles requires understanding a feminist jury's nature and function; fourth, experts can provide information regarding a defendant's group membership and social circumstances necessary to a fuller understanding of the social self; fifth, interpretive social science, which arguably includes psychiatry, has important insights to offer that Popperian social science cannot;¹¹⁵ and sixth, experts can help to narrow the gap between a defendant's and a juror's interpretive frameworks in ways that serve the political goals of evidence law. These tentative conclusions are more fully explained and defended below.

II. THE IMPLICATIONS OF AUTOLOGUE

Part I of this Article argued that mental states are autologues ("self-conversations"), a kind of interpretive act. Part II examines the implications of this insight. Part II begins by comparing proof of mental state itself (an interpretive act) with mental state as circumstantial proof of a physical reality (and thus *not* an interpretive act). The latter needs to be judged by the standards of traditional science. Part II then explores the nature of human lives as narratives, a fact that alters our understanding of the role of social science experts and our conception of the jury. This reconception of the jury, explored in greater depth in Part III, alters our notions of when jurors should hear

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115. Sir Karl Popper argued that demarcation of "science" from non-science was to be judged by the criterion of "falsifiability":

[A] system is to be considered scientific only if it makes assertions which may clash with observations; and a system is, in fact, tested by attempts to produce such clashes, that is to say, by attempts to refute it. Thus testability is the same as refutability, and can therefore likewise be taken as a criterion of demarcation.

KARL POPPER, *CONJECTURES & REFUTATIONS* 256 (1965). The principal proponent of Popperian philosophy in evidence law is Professor David Faigman. See, e.g., David Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989) [hereinafter Faigman, *To Have and Have Not*]. For a contrary view, see Adina Schwartz, *A "Dogma of Empiricism Revisited: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the Need to Resurrect the Philosophical Insight of Frye v. United States*, 10 HARV. J.L. & TECH. 149 (1997). Popper's views on the scientific demarcation problem were but one part of a more comprehensive, relatively consistent worldview. See PAUL DIESING, *HOW DOES SOCIAL SCIENCE WORK?* 29-54 (1991). For purposes of this article, I will use the term "Popperian science" to refer to the notion of falsifiability as the science/non-science demarcation criterion. The wisdom of Popper's views on this question and on his general worldview will be considered in the companion piece. That piece will argue in part that Popper's views were quintessentially patriarchal.

evidence and for what purposes. These revised understandings are explored in Part IV in the context of battered woman's syndrome, an example that introduces several new concepts, including the "acute observer," "evidentiary richness," overcoming cognitive blinders, and valuing interpretive social science.¹¹⁶ These new concepts set the stage for exploring, in Part V, the legitimate role that politics can play in evidence law.

A. The Purposes for Which Proof of Mental State Is Offered

To understand the argument made here, we must separate two different uses of mental states at trial: mental states as themselves elements of a crime or defense versus mental states as circumstantial proof of physical facts. The latter use is better judged by more traditional approaches to scientific evidence. I offer three illustrations in this section.

1. Recovered Memories

Jurors are asked to determine whether a belief accurately reflects what happened to an individual. Suppose, for example, that a psychologist wants to testify that, with her aid, a patient has "recovered" long-buried memories of being sexually abused by her father. In such cases, the sincerity of the patient is rarely questioned. The parties concede that the patient *believes* that she was sexually abused and that her father was the offender.¹¹⁷ The prosecution thus tries to use the mental

116. See *infra* text accompanying notes 260–320. One need not necessarily be a feminist to accept many of the arguments that I make here. These arguments were, however, inspired by feminist thinkers, whose voices too often are silenced when the intellectual debt owed to them is not paid. Moreover, I see the position that I stake out here as a small piece in a larger project committed to achieving a more balanced, caring social order truly committed to equal dignity and respect for all. That project is one I best understand as the feminist one, though other types of thinkers also contribute to similar projects. To those who would ask, "Need I buy into your notions of feminism or patriarchy to accept your distinctions as useful?" I therefore reply, "No, but you will be much poorer for it." See Andrew E. Taslitz, Speech at the Evidence Section Presentation of the Association of American Law Schools' Annual Meeting (Jan. 9, 1998) (draft on file with the *Michigan Journal of Gender & Law*) (explaining why not every feminist insight need be unique to feminism for this movement to offer much of value to evidence law and scholarship).

117. See ELIZABETH LOFTUS & KATHERINE KETCHUM, *THE MYTH OF REPPRESSED MEMORY: FALSE MEMORIES & ALLEGATIONS OF SEXUAL ABUSE* (1994).

state of belief or memory as proof of a physical act—sexual abuse—by a particular person.

We have already seen that memory is continually reconstructed by each of us.¹¹⁸ Memory does not work like a camera taking a photograph.¹¹⁹ Much social science research indeed demonstrates that memories can be highly inaccurate reflections of the physical world precisely because of their creative, constructed character.¹²⁰ Whether a child's genitals were touched and by whom are not interpretive questions. The touching either happened or it did not, and if it did, then either the father did it or did not. The existence of the criminal *act* is not an interpretive question, even though interpretive schemas (such as jurors' assumptions about the likelihood of abuse and about children being truthful) may affect the jury's ability to answer the question accurately. Careful inquiry must thus be made into all the *Daubert* factors and into the concerns of traditional, realist science.¹²¹

2. Eyewitnesses

Eyewitness testimony offers a second example. When an eyewitness says, "that is the man who robbed Johnny; I will never forget that face," the eyewitness reports a memory and his belief in the memory's accuracy. Apart from understanding the memory process, however, we must also understand the perceptual process—the factors that affect our ability to perceive accurately the physical world. Much insightful experimental work has been done on the accuracy of eyewitness testimony, that is, on whether the witness' beliefs about the physical world are true.¹²² The value and generalizability of that work should largely

118. See *supra* text accompanying notes 76–78.

119. See LOFTUS & KETCHUM, *supra* note 117.

120. See LOFTUS & KETCHUM, *supra* note 117.

121. See Faigman, *Social Science*, *supra* note 6, at 961, 965–79 (concluding, under *Daubert's* criteria and realist ontology and epistemology, that research is too speculative and anecdotal to justify admitting expert testimony that a witness remembering a "repressed" event is in fact remembering what truly happened).

122. See, e.g., BRIAN L. CUTLER & STEVEN PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995) (critically analyzing the recent work in this area); ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* 705–09 (1997) (summarizing research).

be judged by the degree to which it complies with the standards of good traditionalist, realist science.¹²³

3. Group Character Evidence

A further example concerns "group character evidence," expert testimony explicitly comparing the personality traits of an individual to those typical of members of a certain group.¹²⁴ Group character evidence might be used to prove a criminal act. For example, one might argue that a defendant fits a "batterer's profile" and, therefore, is more likely to have battered his wife than is someone who does not fit the profile.¹²⁵ This argument can, of course, be framed in purely behavioral terms that circumvent mental state entirely: those fitting profiles are, in almost neo-Pavlovian fashion, simply more likely (like a dog salivating upon seeing food) to behave in a particular way (to batter) given the right stimulus (a longstanding romantic relationship).¹²⁶

Juries are, however, likely also to reason thus: men fitting the profile want control, so *this male* battered his wife to achieve control.¹²⁷ Juries will posit an intermediate mental state as necessary to a coherent understanding of how, why, and when a man might batter.¹²⁸ Mental state, I have argued, is an interpretive act. But mental state here is being used to prove a physical fact—battering. We arguably need to know much about the predictive validity of such mental states before we can confidently so use batterers' profiles. Expert testimony

123. Note my use of the plural, "standards." I do so to make clear that I do not believe that there is necessarily one uniform criteria across all fields for what is good, traditionalist science. See Taslitz, *Feminist Approach Revisited*, *supra* note 7.

124. See Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 462 (1996) (using similar definition); Taslitz, *Myself Alone*, *supra* note 23, at 25 (defining group character evidence).

125. See generally Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 152–62, 170–78 (1997) [hereinafter Raeder, *Batterers' Profiles*] (cataloguing uses of batterers' profiles); Taslitz, *Myself Alone*, *supra* note 23, at 9–14 (cataloguing uses of group character evidence).

126. See Taslitz, *Myself Alone*, *supra* note 23, at 25–27, 46 (explaining that group character uses do not necessarily depend on mental-state inferences).

127. See Raeder, *Batterers' Profiles*, *supra* note 125, at 153, 170 (recounting the O. J. Simpson prosecutors' efforts to establish his motive for killing Nicole Brown Simpson as rooted in the psychology of battering, behavior involving violence rather than control).

128. See Taslitz, *Myself Alone*, *supra* note 23, at 94–98 (illustrating how jurors' need for narrative coherence leads them to posit mental states to explain behavior).

that sought to use the expert's expertise as direct support for *both* the existence of a particular mental state *and* the consequent occurrence of a particular physical act would need, therefore, to meet the standards of traditional science, at least as to the latter question. A different result arguably might be called for if the expert purports only to be helpful in proving mental state and leaves inferences of an act therefrom to lay sensibilities.

This last example differs from the first two examples in important ways. The posited intermediate mental state in a batterer's case is likely to be central to the jury's determination whether an act occurred. Unless the jury understands why a man might batter his spouse, the jury may be unwilling to believe that an unprovoked husband would seriously beat, even kill, his wife.¹²⁹ That unwillingness might stem from the jury's ignorance about the social dynamics of battering.¹³⁰ But battering occurs in a human *relationship*, so juries must understand not merely isolated batterers, but battering relationships.¹³¹ That social knowledge—and very feminist emphasis on the importance of social relationships¹³²—combined with historical information about this particular relationship, is central to an informed interpretation of the evidence of mental state. Unlike the first two examples, therefore, there will be a serious dispute over what the defendant's mental state was, a dispute whose resolution might be aided by evidence of social context. In theory, that expert evidence might be limited solely to proving mental state, an interpretive question. Jurors would then be free to make the lay inference that someone with a particular mental state was more likely to commit a particular act. That latter lay inference would not involve using expert testimony to prove a physical fact, namely the criminal act. In practice, however, the situation is more complex.

The rub is that a jury might misuse contextual social science information about who batters and why to prove the act directly, rather than to interpret an intermediate mental state; that is, the jurors might use the information in a probabilistic fashion (the neo-Pavlovian rea-

129. See Taslitz, *Myself Alone*, *supra* note 23.

130. See Raeder, *Batterers' Profiles*, *supra* note 125, at 181–82 (documenting juror ignorance about the psychodynamics of battering).

131. See Raeder, *Batterers' Profiles*, *supra* note 125, at 161.

132. See WEST, *supra* note 28, at 50–61 (stressing relationships as central to feminism).

soning above).¹³³ Moreover, the jurors may do so even if both the expert and the court tell the jurors to limit the expert testimony solely to the existence of a purported mental state. Reasoning that certain kinds of men batter, that the defendant is of this kind, and that therefore he battered is character-based reasoning to prove conduct, reasoning expressly barred by Federal Rule of Evidence 404.¹³⁴

It may be hard to separate out the extent to which a jury uses social context to interpret mental state versus probabilistic reasoning. The danger of the latter dominating is probably greatest when the social science evidence is presented by the prosecution in the form of a profile, which purports to describe particular batterers and to predict behavior.¹³⁵ This danger will be especially great where there is then evidence that *this defendant* fit that profile.

Even if the jury can initially focus on mental state, that focus remains but one step in a character-based reasoning process—personality as circumstantial evidence of mental state that in turn becomes circumstantial evidence of an act. Rule 404 generally prohibits this process.¹³⁶ It will thus be hard for jurors to avoid ultimately using the expert's profile about a particular defendant to prove his act.

Nonprofile social context evidence relevant to mental state arguably might avoid this trap. The argument would be that prosecutors are focusing on the dynamics of this particular batterer and battered relationship, which can only be understood as part of a broader social context.¹³⁷ Jurors should not conclude, therefore, that the defendant committed these acts because he is a bad person, but rather because he is part of a relationship in which he wanted control. This use of mental-state evidence would be more akin to admissible motive than inadmissible character.¹³⁸ This line between motive and character is imprecise and admittedly sometimes thin, but, if accepted,

133. See Raeder, *Batterers' Profiles*, *supra* note 125, at 160–62, 180 (noting the danger of such juror abuses); Taslitz, *Myself Alone*, *supra* note 23, at 26–27 (defining probabilistic prediction).

134. FED. R. EVID. 404(a). See Raeder, *Batterers' Profiles*, *supra* note 125, at 161–62 (noting this argument as to batterers' profiles); Taslitz, *Myself Alone*, *supra* note 23, at 44–48 (applying a similar argument to all group-based character evidence).

135. See Raeder, *Batterers' Profiles*, *supra* note 125, at 160–62, 179–80.

136. See FED. R. EVID. 404; Taslitz, *Myself Alone*, *supra* note 23, at 44–48.

137. See Raeder, *Batterers' Profiles*, *supra* note 125, at 161–62, 178–84; Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996).

138. Compare Raeder, *Batterers' Profiles*, *supra* note 125, at 161, 170 (motive-like use of group character), with Taslitz, *Myself Alone*, *supra* note 23, at 108–09 (habit).

the focus on mental state ("motive") calls for a different set of admissibility standards than does a focus on probabilistic proof of an act.¹³⁹

Nevertheless, the bottom line of this discussion remains: any time that we seek to prove mental state as an inferential step in a chain purporting to prove an act, we risk the jury's using expert testimony in a probabilistic fashion that the data might not support. There will be close cases, however, where we might still trust the jury to use expert evidence of mental state solely for that purpose, but we must be cautious. Only where the act is admitted, so that we are proving mental state plain and simple, can this extra bit of caution be abandoned.

4. Mental State, Plain and Simple

A battered woman might admit that she killed her husband. She would argue, however, that she did so believing she faced imminent danger of serious bodily injury under circumstances that to nonbattered observers do not seem so fraught with danger.¹⁴⁰ Because only her mental state is at issue, expert testimony should be judged for its value in aiding the jury in interpreting that mental state.¹⁴¹ Both traditional science—judged under a different standard—and interpretive social science will thus be of value.¹⁴² Social science

139. See *supra* Part I & *infra* Part IV (outlining initial admissibility guidelines stemming from the realization that "mental state" is a socially constructed interpretation, rather than a thing "out there" waiting to be discovered).

140. See Taslitz, *Myself Alone*, *supra* note 23, at 11–12.

141. See *supra* text accompanying notes 36–121 (discussing the interpretive nature of mental state). Complex issues surround determining precisely how best to help the jury understand the plight of battered women. Some have argued, for example, that informing the jury on the general socio-psychological dynamics of battering is wiser than relying on a battered woman "syndrome," which rests on arguably flawed methods, portrays women in stereotypical fashion, and works against abused women who do not quite fit the "syndrome" typology. See Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996) [hereinafter Raeder, *Double-Edged Sword*]. Further light is shed on these issues *infra* text accompanying notes 199–212.

142. See *infra* text accompanying notes 260–320. In addition to proving acts or mental states, there is a third use of expert social science evidence at trial—supporting a witness' credibility. I have not addressed this use in text because the analysis is straightforward and has been done effectively by others. See, e.g., Mosteller, *supra* note 124. Briefly, where social science is used purely to describe general reactions to

evidence as to mental state plain and simple will have one special value in particular—to reveal the narrative coherence of human lives.

B. The Narrative Coherence of Human Lives

*The literary mind is not a separate kind of mind. It is our mind. The literary mind is the fundamental mind.*¹⁴³

Our minds engage in two types of thought: propositional and narrative thinking.¹⁴⁴ While “propositional thinking is logical, abstract, context-independent, theoretical, and formal, narrative thinking is concrete, interpersonal, situational, and descriptive of reality.”¹⁴⁵ It is narrative thinking that dominates our conceptions of the self: “Our plannings, our rememberings, even our loving and hating, are guided by narrative plots.”¹⁴⁶

Narrative realists argue indeed that our lives consist of narrative structures.¹⁴⁷ Intentions exist only in historical settings, and we are the consistent refashioning of the historically situated narratives that we tell about ourselves.¹⁴⁸ However, stories consist not only of our actions

known or assumed causes to support credibility, little is asked of the underlying science. See Mosteller, *supra* note 124, at 472–78. For example, a child abuse victim might be impeached by defense counsel’s showing on cross-examination a long delay in the child’s reporting the alleged abuse. The prosecution might then offer expert testimony explaining that children who are *in fact* sexually abused often delay reporting the abuse. This minimal claim can be supported at a high level of generality despite significant Popperian flaws in the science. We need not show that predictions of credibility can be made about any *specific* child. See Mosteller, *supra* note 124, at 472–78.

A fourth use—using expert testimony to prove that conduct was reasonable—is discussed *infra* note 207 and accompanying text.

143. MARK TURNER, *THE LITERARY MIND* at vi (1996).

144. See JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 11–14 (1986); see also P.C. VITZ, *The Use of Stories in Moral Development: New Psychological Reasons for an Old Education Method*, 45 AM. PSYCHOL. 709, 709–10 (1990).

145. NORMAN J. FINKEL, *COMMONSENSE JUSTICE* 69 (1995) (interpreting Bruner’s work on the subject).

146. Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in *NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT* 3, 11 (Theodore R. Sarbin ed., 1986).

147. See FAY, *supra* note 73, at 179 (explaining that “[t]rue stories are found, not constructed”).

148. See FAY, *supra* note 73, at 182. Three features of intentional acts make storytelling a condition for being able to perform any intentional acts whatsoever. Intentional acts are (1) directed toward an end, (2) motivated by a reason, and (3) necessarily look

and intentions, but also of their results and the significance that others ascribe to them.¹⁴⁹ We may ourselves reassess that significance over time. So we simultaneously live stories and have them imposed on us by others.¹⁵⁰ The stories we live happen in interpretive communities, in groups of shared meanings.¹⁵¹ For others to understand our stories, therefore, they need to know our communities as well as our life experiences.¹⁵²

The tales we (suspects, victims, and witnesses) tell at trial seek to bring jurors' narratives about us in line with our own.¹⁵³ To do so, we need powerful stories that can communicate the nature and extent of physical and psychic injuries in a way that description and logical argument cannot.¹⁵⁴ We must also debunk stock stories, preconceived tales resident in jurors' minds that may block other narratives from being heard.¹⁵⁵ Confronting jurors with another's own history and stance can reveal the apparent objectivity of the dominant tales as anything but aperspectival, and can dislodge old understandings to make room for the new.¹⁵⁶ "[S]tories by their very nature . . . appeal to what is, by convention, . . . taboo"¹⁵⁷

Stories also convey "rational emotion," emotion that is properly part of reasoning.¹⁵⁸ The reason/emotion dichotomy is false.¹⁵⁹

toward the future. See FAX, *supra* note 73, at 191–92. Intentional acts thus look to your situation and how you got there in order to determine where you are going, all elements of a good story. See FAX, *supra* note 73, at 191–92.

149. See FAX, *supra* note 73, at 184–90.

150. See FAX, *supra* note 73, at 194–96. This philosophy of social science middle ground between "narrative realism" (we are the stories we tell about ourselves) and "narrative constructivism" (stories are imposed on us by interpreters) is called "narrativism."

151. See FAX, *supra* note 73, at 140–51, 189, 195–96.

152. See FAX, *supra* note 73, at 50–70, 155–77 (noting that we must understand a person's group membership, his unique and particular life circumstances and nature, and the universal laws of human nature to understand that person's meanings and actions).

153. Alternatively, we try to see that the stories that juries form about us are at least *informed* by the stories that we (the trial participants) tell about ourselves.

154. See WEST, *supra* note 28, at 208–11. West lists reasons why *feminist jurisprudence* often takes narrative form, but these reasons equally well explain the value of liberatory storytelling at trial.

155. See WEST, *supra* note 28 at 211–12. See generally Taslitz, *Patriarchal Stories*, *supra* note 15 (defending the existence of, and the need to counter, patriarchal cultural rape tales).

156. See WEST, *supra* note 28, at 213–15.

157. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 33 (1984).

158. See MARTHA C. NUSSBAUM, *POETIC JUSTICE* 62–63 (1995).

159. See NUSSBAUM, *supra* note 158, at 55–72 (rebutting the standard objections to emotions' having a role to play in public judgment).

Emotions consist of both feelings and accompanying beliefs.¹⁶⁰ "To tell whether a certain pain is fear or grief, we have to inspect the beliefs that are bound up in the experience."¹⁶¹ Cognitive science indeed demonstrates that reason cannot happen without emotions and feelings.¹⁶² Emotion also recognizes our interconnectedness to others, a central part of the "self."¹⁶³ Only by making a jury feel a defendant's (or, in appropriate cases, such as rape, a victim's) emotions can the jury engage in "fancy," the ability to see one thing in terms of another.¹⁶⁴ Such emotions need not be unfairly prejudicial; rather, they are part of the jury's sound assessment of the evidence.¹⁶⁵ Adam Smith's notion of the "judicious spectator" makes this clear.¹⁶⁶

The judicious spectator is not personally involved in what he witnesses, so his emotions and thoughts do not relate to his well-being. He is thus unbiased and somewhat detached.¹⁶⁷ He may, however, draw on his own personal history. But in doing so,

160. See NUSSBAUM, *supra* note 158, at 60–63.

161. NUSSBAUM, *supra* note 158, at 61–62.

162. See, e.g., ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994). Irrational emotions are, therefore, those based on false or inappropriate beliefs, but "in no case will emotions be irrational in the sense of being totally cut off from cognition and judgment." NUSSBAUM, *supra* note 158, at 63. Interestingly, one of the key ways that emotion aids cognition is by telling us what to value and by how much. See NUSSBAUM, *supra* note 158, at 63–72. For a more recent detailed defense of the role of emotions in *criminal law* specifically, see Kahan & Nussbaum, *supra* note 79.

163. Compare NUSSBAUM, *supra* note 158, at 63–72 (explaining that even under a liberal notion of the self, emotions properly enter into public judgment by emphasizing our interrelatedness), with *supra* text accompanying notes 67–94 (defending a more permeable, social notion of the self). See also Diana Tietjens Meyers, *Emotions and Heterodox Moral Perception*, in *FEMINISTS RETHINK THE SELF*, *supra* note 28, at 197–214 (understanding that disparaged emotional attitudes, such as hypersensitivity and paranoia, are feminist epistemic virtues that reveal the poverty of an individualistic view of moral identity).

164. See CHARLES DICKENS, *HARD TIMES* 1–26, 202 (1981); NUSSBAUM, *supra* note 158, at 36–52 (illustrating philosophical power of "fancy"). "Fancy" must usually be directed to the criminal defendant because it is generally his thoughts and emotions, his mental state, that is at issue. In some cases, such as rape, which requires the victim's nonconsent, the law arguably makes the victim's thoughts and emotions relevant too. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 422–24 (comparing "subjective" and "objective" notions of consent in rape cases).

165. See NUSSBAUM, *supra* note 158, at 72–78.

166. See NUSSBAUM, *supra* note 158, at 72–78.

167. See NUSSBAUM, *supra* note 158, at 72–78.

[T]he spectator must . . . endeavour, as much as he can to put himself in the situation of the other, and to bring home to himself every little circumstance of distress which can possibly occur to the sufferer. He must adopt the whole case of his companion with all its minutest incidents; and strive to render as perfect as possible that imaginary change of situation upon which his sympathy is founded.¹⁶⁸

Thus, both empathic participation and external assessment are necessary for such a spectator.¹⁶⁹ But not all emotions promote sound judgment. The emotion must be one "informed by a true view of what is going on—of the facts of the case, of their significance for the actors in the situation, and of any dimensions of their true significance or importance that may elude or be distorted in the actors' own consciousness."¹⁷⁰ The emotions must also be those that still permit

168. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 22 (1774).

169. See NUSSBAUM, *supra* note 158, at 73–74.

170. NUSSBAUM, *supra* note 158, at 74. It is important to comment on Nussbaum's use of the word "true" in this quote. What she seems to mean is that the judicious spectator should not make decisions based upon lies or incomplete information. Empathy must be felt for the situation in which another actually found herself (such as being battered by a spouse), not for a purely manufactured, fictional situation. Furthermore, the judicious spectator must know the significance of the facts for the actors at the time, not a pretended significance. For example, the spectator must ask whether the victim feared her spouse would kill her, or whether that is a lie meant to cover up her greed for his life insurance policy proceeds. Finally, because empathy must be tempered by normative assessment, the judicious spectator must be ready to make judgments about whether the facts or their significance were distorted in the actors' own mind. For example, the spectator must judge whether the battered woman accurately saw her husband pick up a baseball bat, or whether she was mistaken. See NUSSBAUM, *supra* note 158, at 74–75.

Nussbaum's reading of the judicious spectator does not, therefore, require rejecting a belief that realism makes sense for many fact determinations, that is, those not involving mental states. Even for some aspects of mental-state determination, Nussbaum apparently recognizes that our judgments can turn on ordinary assessments of credibility rooted in realist notions, but this recognition is fully consistent with the position argued here.

Assume, for example, that Lyle and Erik Menendez were simply lying in claiming that they had been sexually abused as children and in further claiming that they killed their parents because they feared that their parents would instead kill them. See HAZEL THORNTON, *HUNG JURY: THE DIARY OF A MENENDEZ JUROR* at xiv–xvii (1995) (summarizing prosecution and defense versions of the facts in this infamous case). Here, we can challenge in the usual fashion their credibility about whether certain acts—past sexual abuse and currently physically threatening behavior by their parents—took place. Thus, a close family member in a position to testify about such

"reflective assessment of the situation to figure out whether the participants have understood it correctly and reacted reasonably" ¹⁷¹ Moreover, the spectator must filter out emotions that derive from our

acts might declare that they never took place. If believed, then the Menendez' claims of fear—mental-state claims—become incredible.

There is a key distinction here. The Menendez brothers admit a criminal act (killing) but argue for a less or nonculpable mental state based on alleged acts by others (their parents). Disproving the parents' physical *acts* tends to rebut the suspects' claimed mental state. Here, however, I have largely been addressing a different question: "Supposing that the Menendez parents did engage in threatening acts of sexual abuse, what were Lyle and Erik's mental states, and were they reasonable?" This question is an interpretive one that may be informed by an understanding of the dynamics of child sexual abuse.

The remaining problem is that a jury does not first decide the physical facts and report them to the judge, with the judge then deciding whether to admit expert testimony at some later stage. Rather, the jury hears all the evidence, then renders a single verdict. Testimony by an expert on child sexual abuse that the Menendez brothers' behavior was consistent with such abuse would tend to support both their credibility *and* help directly to prove that acts of parental sexual abuse occurred. As I have argued, the latter proof question—the occurrence of an act—should generally be judged by more traditional evidentiary standards.

At the same time, however, the experts' testimony about the dynamics of child sexual abuse and the Menendez brothers' role in those dynamics may be relevant to the interpretive question of what was their mental state if, indeed, they *were* sexually abused. This situation is thus very different from the battered woman case in which the husband's abuse is undisputed and only the wife's mental state is at issue. There may thus be cases where the line between proof of acts and proof of mental state plain and simple is hard to draw. I have noted earlier that we should be wary of admitting expert testimony in such cases. Whether we can ever do so, and subject to what safeguards, is a complex question that cannot fully be answered until reviewing the plausibility/improbability distinction to be developed in the companion piece. For now, my primary goal is simply to emphasize that the judicious spectator concept is consistent with the need to make credibility judgments and with the assumption that *sometimes* realism makes sense; there is a "true view" of what is going on. But this approach—drawing on aspects of modernism and aspects of postmodernism, with the mix varying with the situation—is fully consistent with the pragmatic postmodernism I articulated earlier in this piece.

Finally, my argument that determinations of mental state plain and simple are interpretive acts, while other sorts of trial determinations are not, is more precisely a relative, rather than an absolute, notion. "Did John hit Sally?" is either true or false in a realist sense, but our interpretive assumptions—our prejudices, preconceptions, and beliefs—may affect our ability accurately to answer that question. For such a question, there is a single "objective" truth to discover, but it may be hard to do so. On the other hand, as the Menendez problem illustrates, the answers to realist questions are relevant even to the more "purely" interpretive (and thus nonrealist) determination of mental state.

171. NUSSBAUM, *supra* note 158, at 74.

interest in our personal well-being, "that portion of anger, fear, and so on, that focuses on the self."¹⁷²

Smith's arguments concern our attitude for making moral judgments.¹⁷³ But trials are necessarily morality plays,¹⁷⁴ and our moral reasoning is necessarily narrative in form.¹⁷⁵

Professor Martha Nussbaum argues that the judicious spectator is an extremely good model for the juror.¹⁷⁶ Of course, jurors will also be constrained in legal ways regarding what they may consider. A jury behaving like the judicious spectator will be simultaneously emotionally empathic, detached, and judgmental: "Sympathetic emotion that is tethered to the evidence, institutionally constrained in appropriate ways, and free from reference to one's own situation . . . [is] not only acceptable but actually essential to public judgment."¹⁷⁷

There are also political implications in the stories told at trial. All social storytelling involves power.¹⁷⁸ Whose stories are told, whose heard, and whose believed simultaneously reflect and create power.¹⁷⁹ Stories create our sense of the real by including some voices while ex-

172. NUSSBAUM, *supra* note 158, at 74. Importantly, Nussbaum notes that Smith derives the "judicious spectator" from literary readership, an approach to reading good stories. See NUSSBAUM, *supra* note 158, at 10, 75. Nussbaum sees the judicious spectator as linked to the uniqueness and value of every individual human being:

If we do not begin with "fancy" and wonder about the human shapes before us, with sympathy for their sufferings and joy at their well-being, if we do not appreciate the importance of viewing each person as separate with a single life to live, then our critique of pernicious emotions will have little basis.

NUSSBAUM, *supra* note 158, at 76.

173. See SMITH, *supra* note 168.

174. See Peter Arenella, *Rethinking the Function of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-98 (1983) (explaining that the determination of mental state in a criminal trial necessarily involves moral evaluation); Taslitz, *Patriarchal Stories*, *supra* note 15, at 419-24 (stating that the fact/value distinction is an illusion); see also Kahan & Nussbaum, *supra* note 79 (explaining that much of the substantive criminal law embodies an evaluative conception of emotions as part of mental states and requires jurors to judge the moral appropriateness of a criminal defendant's emotions).

175. See Margaret Urban Walker, *Picking Up Pieces: Lives, Stories, and Integrity*, in FEMINISTS RETHINK THE SELF, *supra* note 28, at 62, 62-81.

176. See NUSSBAUM, *supra* note 158, at 77-78.

177. NUSSBAUM, *supra* note 158, at 78.

178. See KEN PLUMMER, *TELLING SEXUAL STORIES: POWER, CHANGE AND SOCIAL WORLDS* 26-31 (1995).

179. See PLUMMER, *supra* note 178, at 26-31.

cluding others.¹⁸⁰ Stories can thus empower and energize, or they can degrade, control, dominate, and pathologize.¹⁸¹ Jodi Armour put it thus:

Storytelling—narrative—shapes our responses to the world. It excites and channels our passions and sympathies, inviting us to become certain kinds of people (compassionate and understanding or self-righteous and vindictive, for example).

...

Narrative, moreover, can be subversive. What is taken for granted in a dominant narrative—truth, common sense, reasonableness—may be fiercely contested in the outsider version.¹⁸²

The framing of narrative, therefore, carries profoundly political implications. "Put differently, the terms of narrative are prizes in a pitched conflict among groups to describe their social reality, constitute their social identity, and vindicate their social existence."¹⁸³

The rules of evidence, because they control the terms under which tales can be told, are thus necessarily political.¹⁸⁴ Each individual's trial is a battleground for group interests and perceptions, which are inextricably bound up in the selves that constitute the parties, the judge, and the jury and are reflected in the relationships among them all. The battle is an epistemological one—whose worldview will control?¹⁸⁵ When dominant worldviews prevail, dominant systems of

180. See CODE, *RHETORICAL SPACES*, *supra* note 40, at 154–84; Taslitz, *Patriarchal Stories*, *supra* note 15 (illustrating this point in rape trials).

181. See PLUMMER, *supra* note 178, at 26–31.

182. ARMOUR, *supra* note 94, at 81.

183. ARMOUR, *supra* note 94, at 81.

184. See Mosteller, *supra* note 124, at 514–16 (reluctantly conceding this "postmodern insight").

185. See ARMOUR, *supra* note 94, at 81–114. This battle of worldviews is an observation, not a moral aspiration. Some feminists would decry the notion that politics necessarily should involve a market-based conflict among narrowly self-interested groups. See, e.g., Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in *FEMINISM & POLITICAL THEORY* 143, 143–45 (Cass R. Sunstein ed., 1990) Many feminists reject an abstract political individualism in which self-interested utility maximizers form communities based on competition and conflict among persons vying for scarce resources. An alternative feminist vision would favor an ideal in which

power distribution are instantiated by the jury's very act of decision.¹⁸⁶ But those decisions also affect human and material resources: who gets access to physical freedom, money, education, and who does not. Power politics and epistemology merge.

For example, patriarchal cultural storytelling rules lead jurors in rape trials to look for physical "bruises" as evidence of bullying.¹⁸⁷ Absent such bruises, the chances of conviction fall.¹⁸⁸ Rape trauma syndrome ("RTS") is one way to convince jurors that there are psychic and behavioral bruises as real and objective as physical ones.¹⁸⁹ Yet, in many courts patriarchal evidence rules permit use of RTS to rebut rape myths but not to prove that a rape (as opposed to consensual sexual intercourse) occurred.¹⁹⁰ This latter prohibition seems to ban

Armour notes that evidence rules that broaden context and perspective confront jurors with the social, cultural, and economic conditions surrounding an incident. See ARMOUR, *supra* note 94, at 82–83. That confrontation reduces the perception of an actor's unbridled free will, forcing jurors to confront the political assumptions and effects of the criminal justice system. See ARMOUR, *supra* note 94, at 81–114. Paul Harris sees this confrontation as a wise process that pushes jurors to see society as sharing responsibility for the crime, without necessarily freeing defendants of responsibility. See HARRIS, *supra* note 93, at 264–75. This widened perspective in turn helps to promote a liberating social vision. See HARRIS, *supra* note 93, at 264–75.

186. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 433–75 (illustrating this point in rape trials).

187. Our culture teaches us, through stories, about proper gendered behavior and about rape. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 434–39. Jurors bring those stories into the courtroom, where victims' accounts are judged by their consistency with cultural tales embodying common themes. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 434–39. One of those themes is that only bullies rape. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 448–53. But all men are expected to use some force without thereby becoming bullies, so bullies are those who use much more significant force against weaker opponents. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 448–53. Juries will, therefore, look for signs of bullying, with physical bruises being among the most common. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 448–53. Because rape victims often do not suffer such bruises, their accounts fail to match the rules for a "good" rape story. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 491–92. Accounts that do not fit the rules of patriarchal cultural storytelling do not seem credible. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 434–39.

188. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 448–53, 491–93.

189. See Taslitz, *Patriarchal Stories*, *supra* note 15, 491–93.

190. See Karla Fischer, Note, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 725. For a thorough recent survey of when and for what purposes courts admit RTS testimony, and for alternative definitions of RTS, see DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §§ 10-1.1 to -1.5, at 402–14 (1997) [hereinafter FAIGMAN, EXPERT TESTIMONY]. The fine points of RTS analysis—such as whether there is a difference between disproving consent and proving a rape, or between RTS's "consistency" with rape and its "proving" a rape—need not

bruise-like reasoning; that is, the claim that just as a bruise demonstrates that you were punched, rape trauma syndrome demonstrates that you were raped.¹⁹¹ Cultural stories require proof that expert evidence rules bar. It is therefore hard to translate a rape victim's experience into terms that jurors can understand. That means, in turn, that the jurors' reality will diverge dramatically from the victim's. There will be a failure of the detached empathy that judicious spectatorship requires.

This does not necessarily mean that the ban on bruise-like reasoning is inappropriate. But both the overall evidence in a particular case and any relevant scientific data might be subject to several plausible interpretations.¹⁹² Each interpretation and each evidence rule will have political implications, which will make the adoption of particular interpretations more or less likely.¹⁹³ Since politics is unavoidable, we should overtly consider the political impact of our evidence rules as one relevant factor in crafting them. This consideration is particularly weighty regarding mental-state determinations, precisely because those judgments necessarily involve preexisting politically-charged interpretive schema that may have repressive consequences.¹⁹⁴ Society should

concern us in any detail for the narrow points illustrated here. I do, however, note that evidence that a woman was emotionally injured (even if not physically injured beyond the act of intercourse) by a suspect is evidence that she did not consent. Consent, in turn, is a mental state of the victim. So viewed, RTS goes to prove the victim's mental state, not the defendant's wrongful act. On the other hand, if non-consent is more likely, then any alleged physical acts by the defendant to overcome nonconsent are more likely too. While I think that RTS legitimately goes far more directly to proving the victim's mental state than to any act by the defendant, agreeing with that conclusion is not necessary to the point for which I cite the RTS-bruising example in the text. My point is to illustrate that evidentiary rulings, such as courts' treatment of RTS, have both political implications and implications for jurors' ability to feel detached empathy for others. That illustration holds whether you believe that the dominant purpose of RTS concerns the victim's mental state or not.

191. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 491–93 & n.660.

192. See, e.g., KLEE, *supra* note 40, at 177–79 (conceding that scientific data may be subject to many interpretations, not all of which are equal); Taslitz, *Myself Alone*, *supra* note 23, at 96–98 (encouraging the jury to consider “plausible alternatives to normal” in evaluating the total impact of case evidence as a legitimate evidentiary goal).

193. See Taslitz, *Interpretive Method*, *supra* note 113 (illustrating the political values underlying the Supreme Court's interpretation of evidence rules); Taslitz, *Myself Alone*, *supra* note 23, at 19–24, 86–91 (illustrating the political values underlying expert character evidence decisions).

194. See, e.g., ARMOUR, *supra* note 94, at 81–114. Armour stresses in particular that seemingly neutral evidence rules can benefit the majority. He quotes this example from Mark Kelman to clarify how this pro-majority bias affects rule definition:

strive toward a citizenry willing to craft more liberating interpretations—ones more respectful of the equal dignity of all persons—from among the plausible options.¹⁹⁵

For these same reasons, we should not automatically impose the burden on the party seeking to change the status quo. No set of social relations, including rules of law, is purely “natural”; an element of social choice is always involved.¹⁹⁶ Thus, jurors come to a rape trial with preconceptions about appropriate gendered behavior and the nature of rape. These preconceptions need not be “myths.” Instead, the preconceptions might sometimes accurately reflect, indeed help to constitute, the relationships between the sexes in a patriarchal society.¹⁹⁷ Yet, we might normatively deem those conceptions wrong and certainly not reflective of all social actors. If that is so, why should we automatically impose the burden on the prosecution to show that expert testimony seeking to substitute a different, nonpatriarchal vision of sexual relationships merits admission at trial?

One response might be that this opens the door to simple propaganda, unsupported by any serious scientific inquiry and thus not offering any special “expertise” that a layperson does not offer. But this still does not answer the burdens question. We might simply say that the defense has the burden of showing that the new prosecution expert is simply a propagandist. Alternatively, we might take a middle ground that concedes that the prosecution should bear the burden, but lightens that burden relative to what it is in some other situations.¹⁹⁸ The point is that who has what kind of burden as to any expert evidence question is both a contextual and political judgment.

A large social group is setting up a massive health insurance, risk-pooling plan. Should treating hemophilia be included? Since hemophilia is a purely hereditary ailment, everyone will know whether he faces high bills for the disease. Purely selfish insurance purchasers will exclude the disease from coverage. If the defense of duress is “insurance” against being blamed or incarcerated, the dominant social group will exclude “long-term pressures” as a covered syndrome since they already know they will not be afflicted.

Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 646 n.144 (1981).

195. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 491–500; *see also infra* Part V.

196. Cf. CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (making this point in connection with constitutional interpretation).

197. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 402–33.

198. See Taslitz, *Myself Alone*, *supra* note 23, at 117–20 (explaining that political reasons justify imposing a heavier burden on the prosecution than on the defense to prove that psychological character evidence is reliable).

Battered Woman's Syndrome (BWS or the syndrome) offers a brief example. Weaknesses in the methodology by which the syndrome was first articulated make it at least debatable whether the syndrome itself, and certainly certain aspects of it such as "learned helplessness" and the "cycle theory of violence",¹⁹⁹ are plausible.²⁰⁰ Nevertheless, even the most vocal critics of the syndrome concede that it helped to advance certain *political* goals, including increasing the resources devoted to solving the problem of domestic violence, focusing attention on the male-centered nature of the law of self-defense, and promoting further research.²⁰¹ Others recognize that, despite the flawed methodology, the syndrome serves the political/epistemic goal of effectively educating jurors about the nature of domestic violence in a way that aids informed decision-making.²⁰² Courts and legislators thus implicitly came down on the plausible side of the debate, finding the syndrome plausible enough given its political foundations.²⁰³

But those foundations are crumbling. Syndrome logic has been criticized for wrongly pathologizing women, for harming the many who do not fit the "syndrome" but have been abused, and for failing to treat women as capable of the kind of moral responsibility essential to equal citizenship in a democratic polity.²⁰⁴ Furthermore, competing empirical models, often based on sounder traditional scientific

199. "Learned helplessness" is the idea that battered women do not leave their batterers because, like dogs electrically shocked upon trying to leave a cage, women learn that they are helpless to stop the pain. See DOWNS, *supra* note 67, at 81–82. The "cycle theory of violence" argues that three phases characterize the battering relationship—tension buildup, acute battering, and loving contrition. See DOWNS, *supra* note 67, at 81–82. The cycle theory seeks to explain why it is reasonable for women both to feel danger outside imminent harm and to stay despite that danger.

200. See DOWNS, *supra* note 67, at 145–69 (cataloguing methodological flaws in BWS research).

201. See Faigman, *Age of Science*, *supra* note 13, at 69 (also urging that we not politicize science). I argue not for the politicization of science, but for the recognition of the unavoidable politicization of evidence law more generally.

202. See DOWNS, *supra* note 67, at 103–29 (praising BWS for dispelling myths and displacing sexist cultural narratives).

203. See Mosteller, *supra* note 124, at 485–91, 509–16 (claiming that BWS' admissibility is only explainable on political grounds); Raeder, *Double-Edged Sword*, *supra* note 141, at 795–96 (stating that all 50 states allowed some form of BWS testimony). While Professor Mosteller noted the political component explaining BWS' admissibility, I stress the political component in the *challenges* to BWS.

204. See DOWNS, *supra* note 67, at 158–220; Raeder, *Double-Edged Sword*, *supra* note 141, at 800–01.

methods, have come to the fore.²⁰⁵ While no one model is dominant, all the models, including aspects of BWS, can be seen as converging on a picture of battered women as hyper-rational, rather than pathological. Battered women are thus actors who, because of their unusual life experiences, have an acute awareness of danger from the batterer that those unfamiliar with the dynamics of battering would not fully appreciate.²⁰⁶ Furthermore, the various models help to convey the rational emotions involved by presenting powerful evidence of the dangers, fears, and difficult choices these women had to make.²⁰⁷ The growing consensus, therefore, is that contextual expert

205. See DOWNS, *supra* note 67, at 76–99 (surveying alternative models); Faigman, *Age of Science*, *supra* note 13, at 75 (“[A]lthough significant amounts of excellent research have been done in the last decade, none of it has obtained results that support the hypothesis of the battered woman syndrome.”); Raeder, *Double-Edged Sword*, *supra* note 141, at 798 (“Although there is general agreement that learned helplessness has its limitations, no one concept has emerged as its replacement.”).

206. See DOWNS, *supra* note 67, at 96–99. Well-known researchers in this area express it this way:

Considerable research also documents the wide range of responses taken by battered women in violent relationships. Moreover, given the reality and inherent danger that some of these actions may provoke, these behaviors have been viewed more as a response to a realistic appraisal of the situation as opposed to a helpless reaction to the violence.

FAIGMAN, EXPERT TESTIMONY, *supra* note 190, § 8-2.3, at 377.

207. See DOWNS, *supra* note 67, at 103–10. Awareness of the dangers, fears, and difficult choices the woman had to make may go to the “reasonableness” of her actions in self-defense. “Reasonableness” logically may include “normalcy,” defined as behavior typical of many people. But “reasonableness” ultimately involves an essentially moral judgment that the woman’s beliefs or actions were understandable. Professor Mosteller suggests that expert testimony offered to show normalcy need not meet the highest standards of Popperian science, but testimony to show the understandable nature of the woman’s beliefs and actions should (absent strong countervailing reasons) ordinarily be held to a stricter standard. See Mosteller, *supra* note 124, at 480–84, 502–03. I agree regarding the first use (normalcy), but not necessarily regarding the second. To prove that a woman engaged in certain mental processes that explain why she did not leave her batterer is still to prove *mental state*. Once proven, that mental state is argued to be circumstantial evidence of the “reasonableness” of her act of assault, given the social setting and other circumstances. Admittedly, this is a more demanding task, requiring greater assurances of reliability, than in proving “normalcy.” But as discussed earlier, mental state is an interpretive act, and the quality of expert testimony regarding interpretation is to be judged by a different standard (I leave to the companion piece whether that standard is “stricter” or not) than in proving a physical fact about the world. Therefore, BWS should be judged, at most, entirely by Popperian science only if offered to prove a physical act or its absence. Such science should, however, be viewed more charitably and supplemented by other kinds of science when proving mental state. Of course, experts should not be allowed

testimony regarding battering relationships that avoids any rigid "one size fits all" model and syndrome logic should be admissible.²⁰⁸

Juries are unlikely, however, to give such evidence proper weight unless it is linked by clinical testimony to the specific defendant involved.²⁰⁹ Moreover, such testimony may be essential to achieving the detached empathy of the judicious spectator, precisely because it brings together the unique defendant's life history in story-like fashion. Many well-respected commentators continue to find sufficient plausibility in BWS, however, to permit its continued use where it fits the lived experience of a particular relationship or involves true pathology, as with an insanity defense.²¹⁰ The point is that the growing movement against BWS is largely and properly rooted in a political critique that affects what we consider plausible and what weight we assign to it.²¹¹

The criticism does not hold that these political judgments to admit BWS or not are veiled changes in the substantive criminal law best made by legislatures.²¹² The judgment remains that each case of battering is in some sense unique and that juries are the appropriate entities to make the contextual, case-by-case epistemic/moral judgment of culpability.²¹³ The political decision, therefore, is simply that juries need to be fully informed of the social and psychological context to render better decisions.²¹⁴

expressly to opine about normalcy or reasonableness. See Mosteller, *supra* note 124, at 502-03.

208. See, e.g., Downs, *supra* note 67, at 227-28 (favoring contextual expert testimony that avoids syndrome logic); Raeder, *Double-Edged Sword*, *supra* note 141, at 795-802 (stating BWS is flawed in making one size fit all).

209. See Mosteller, *supra* note 124, at 477 n.49.

210. See, e.g., Downs, *supra* note 67, at 180 (discussing insanity or other pathology, but preferring to focus on the woman's situation, rather than on her mental condition); Raeder, *Double-Edged Sword*, *supra* note 141, at 797 (suggesting that the application of BWS be grounded in examination of the particular relationship).

211. See Downs, *supra* note 67, at 27 ("Changes in the law of evidence reflect the sociological and political condition of knowledge in addition to knowledge's purely scientific status.").

212. See Faigman, *To Have and Have Not*, *supra* note 115.

213. See Mosteller, *supra* note 124, at 488 n.91 (recognizing that the focus on context is a hallmark of feminism).

214. See Mosteller, *supra* note 124, at 487, 515 n.181.

III. THE FEMINIST JURY

Should feminists endorse this faith in the jury? The answer is yes. A pragmatic, postmodern feminism, by viewing the self as relational, recognizes the importance of community participation in the creation of social meaning.²¹⁵ Jury determinations also permit the kinds of contextual, individualized judgments of which feminism approves.²¹⁶ Recognizing the invalidity of the fact/value distinction further supports a role for a properly educated, communal, moral voice in fact-finding.²¹⁷ Martha Nussbaum, indeed, seemed attracted to the "judicious spectator" model for jury decision-making precisely because of her very feminist belief that unbiased, empathic, individualized justice is an important good often best achieved by juries.²¹⁸ Indeed,

215. See Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1342-43 (1987) (advocating an implicitly feminist approach to hearsay by defending juries' contextual reasoning as the appropriate voice of the community); *supra* text accompanying notes 143-190. I spend some time articulating a feminist vision of the jury for several reasons. First, feminists provide additional reasons to those offered by some other theorists for trust in the institution of the jury. At the same time, feminists are alert to the dangers of juries being abused in ways that oppress women and others. If feminists express support for the jury, despite these dangers, that is persuasive evidence of at least a perceived liberating potential in jury decision-making. Yet feminists' cautions also teach us not to trust the jury blindly, but rather to consider ways to improve its functioning. Essentially, feminist theory suggests rejecting a reading of *Daubert* that favors "screening" weak evidence from the jury and accepting instead a reading that mandates proper jury education. Solutions other than exclusion of expert testimony should be considered first, turning to exclusion only if other methods fail. See Taslitz, *Myself Alone*, *supra* note 23, at 113-20 (discussing evidence law alternatives to simple exclusion of evidence).

Second, while there might be nonfeminist reasons for trusting the jury, I would be wary of such trust if I thought it undermined broader, liberating feminist goals. It is important to demonstrate that trusting in a particular conception of the jury is consistent with feminist theory. The companion piece will address in more detail how expert evidence law can further serve this particular feminist conception.

I therefore offer just enough review of feminist theory to support these two points, but I do not present a comprehensive pragmatic postmodern theory of the jury, an effort that would require book-length treatment and that is, in any event, not necessary to my task here.

216. Compare Swift, *supra* note 215, at 1342-43, with Orenstein, *My God!*, *supra* note 15, at 183-95.

217. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 419-24.

218. See NUSSBAUM, *supra* note 158, at 73-78:

Among [the judicious spectator's] most important moral faculties is the power of imagining vividly what it is like to be each of the persons whose situation he imagines.

...

many feminist legal reforms to the criminal justice system—rape shield laws, battered women experts, rape trauma experts—focus on improving the empathic, contextualized decision making of jurors via evidentiary reform, rather than broadly applicable changes in substantive rules of criminal law.²¹⁹

Part III defends the claim that feminist evidence rules should reflect trust in the institution of the jury in greater detail. Part III also defends a particular conception of the jury as an empathic, communal, deliberative body, rather than an emotionally detached collection of self-interested individuals whose biases are played against one another. The deliberative, communal function of the jury makes it an inherently political institution. Once the empathic nature of the jury is recognized, policymakers and trial judges may more clearly understand the relevance and weight of certain expert testimony in a way they otherwise would not, as Part IV will illustrate. Once the political nature of the jury is appreciated, policymakers and trial judges should also better understand the need for candor about the role of evidentiary politics in expert evidence decisions, as Part V will explore. Finally, viewing the trial as a way to educate the jury as community representative cautions against too easily excluding expert

The judicious spectator/reader learns an emotional repertory that is rich and intense but free from the special bias that derives from knowing one's own personal stake in the outcome. A reader's emotions will also be constrained by the "record"—by the fact that they are restricted to the information presented in the text. In this way, we can now see, the judicious spectator is an extremely good model for the juror.

...

[The judicious spectator learns] what it is to have emotion, not for a "faceless undifferentiated mass," but for the "uniquely individual human being."

219. See, e.g., PEGGY REEVES SANDAY, *A WOMAN SCORNE* 161–83 (1996) (explaining the historical growth of rape shield and other rape law reforms from feminist political theory); CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM* 25–29 (1992) (explaining the role of rape shield laws in counteracting rape myths that may skew understanding of a rape victim's situation); Aviva Orenstein, *No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials* 45–63 (draft manuscript 1997, on file with the *Michigan Journal of Gender and Law*) [hereinafter Orenstein, *No Bad Men*] (supporting an expanded role for experts in rape and battering trials); Taslitz, *Myself Alone*, *supra* note 23 (exploring ways that psychological experts can improve jurors' contextualized decision-making); Taslitz, *Patriarchal Stories*, *supra* note 15, at 389–94, 491–500 (framing a discussion exploring how to promote more informed verdicts in rape cases).

testimony, rather than re-crafting it to improve its value for the fact-finder.

A. *Difference and Empathy Critics*

Martha Minow's analysis of how two streams of feminist thought—"difference critics" and "empathy critics"—view peremptory challenges sheds light on the feminist jury ideal.²²⁰ Difference critics reject universal norms because they mask the subordinate groups' perspectives.²²¹ Different group life experiences and consciousness lead, on average, to different group perspectives.²²² To judge anyone, particularly someone from a disempowered group, without them being represented on the jury is to exclude a perspective necessary for a complete picture and an informed judgment. Moreover, there is a value in group participation itself as an exercise of power, bringing the group involved more fully into the broader community. While not every group member will fairly represent the group, the group is more willing to trust its own members as representatives than nonmembers.²²³

Empathy critics, by contrast, trust that we can sometimes effectively and fairly speak for and understand those different from ourselves.²²⁴ We can do so because of the power of altruism:

[M]aybe, just maybe, the idea that we are all basically self-interested is wrong Some feminists, some humanists, some self-styled communitarians join a variety of people who think it wrong or incomplete to think of people as separate, autonomous, and self-interested. I will call these people the *empathy* advocates. They argue that people (1) often want to care about the good of others (altruism) and (2) have the ability to understand and know the wants and needs of others (empathy). The empathy advocates also argue that individuals act out of duty, love, and benevolence as well as

220. Martha Minow, *From Class Actions to "Miss Saigon": The Concept of Representation in the Law*, in REPRESENTING WOMEN: LAW, LITERATURE, AND FEMINISM 8, 17–20 (Susan Sage Heinzelman & Zipporah Batshaw Wiseman eds., 1994).

221. See Minow, *supra* note 220, at 17–18.

222. See Minow, *supra* note 220, at 17–18.

223. See Minow, *supra* note 220, at 17–20 (describing difference critic views).

224. See Minow, *supra* note 220, at 19.

self-interest . . . and the common good when they decide what constitutes a "benefit" that they want to maximize.²²⁵

Moreover, empathy critics "explain the malleability of human beings, and discuss how learning environments and social arrangements can reinforce either selfishness or sharing and altruism."²²⁶

These differing views might suggest differing answers to the question of whether, or when, to permit peremptory challenges. But Minow argues the opposite, relying on *Hernandez v. New York*,²²⁷ in which a plurality of the U.S. Supreme Court approved the prosecutor's use of peremptory challenges to exclude all Spanish-speaking jurors. The prosecutor argued that such jurors would not limit themselves to the official translation and would have undue jury room influence.²²⁸

Difference critics responded that excluding Spanish-speaking jurors from a trial involving Spanish speakers excluded a critical perspective.²²⁹ Someone lacking that perspective, especially if a member of the dominant social group, "may lack awareness of the perceptions and motivations of someone outside that group, and may even lack the tools to understand someone so different."²³⁰ In any event, Spanish speakers must be allowed to participate in broader communal decisions.²³¹

Empathy critics reached the same conclusion. The problem for these critics is that excluding Spanish speakers assumes that people cannot empathize across group lines. Spanish speakers can come to understand non-Spanish speakers and vice versa. Moreover, Spanish-speaking jurors can be fair and will not necessarily act in the self-interest of their group.²³²

While we may not know whether empathy works differently between those sharing certain traits and those not, that ignorance simply suggests the wisdom of a diverse range of views so that "the full range

225. Minow, *supra* note 220, at 19.

226. Minow, *supra* note 220, at 19.

227. *Hernandez v. New York*, 500 U.S. 352 (1991) (Kennedy, J., plurality).

228. *See Hernandez*, 500 U.S. at 353.

229. *See* Minow, *supra* note 220, at 21–22 & 39 nn.94–95.

230. Minow, *supra* note 220, at 22.

231. *See* Minow, *supra* note 220, at 22.

232. *See* Minow, *supra* note 220, at 22.

of empathic and nonempathic possibilities [can] be played out."²³³ Excluding Spanish speakers was wrong.

B. *The Deliberative Jury*

Despite the convergence of difference and empathy theorists in Minow's example, she apparently finds a fundamental contradiction between the two theories' notions of juries' nature.²³⁴ While empathy theorists stress community, difference theorists stress group conflict. That stress may be seen as adopting the Hobbesian notion that "humans are separate and have conflicting wills."²³⁵ Juries are not communities but an occasion for interest group politics.

Yet this contradiction can be resolved because difference critics' views are consistent with the "deliberative jury ideal." This ideal is "a model of democracy that believes that face-to-face meetings matter, that voting is secondary to debate and discussion, that power should ultimately go to the persuasive, [and] that collective wisdom results from gathering people in conversation from different walks of life."²³⁶

*Ballard v. United States*²³⁷ illustrates this point. In this case, Edna Ballard and her son were convicted of mail fraud for seeking to make profit from promoting a religion in which they themselves allegedly did not believe. The trial court had excluded all women from the jury on the grounds that the courthouse lacked adequate accommodations for women. The Court, exercising its supervisory power, reversed the conviction, declaring that deliberate exclusion of women from jury service in a jurisdiction in which they were eligible to serve violated the jury's obligation to reflect a cross-section of the community. While the Court conceded that neither women nor men necessarily act as a class, the Court concluded that women could offer a perspective that men could not:

233. Minow, *supra* note 220, at 23.

234. See Minow, *supra* note 220, at 19–20.

235. Minow, *supra* note 220, at 19.

236. JEFFREY ABRAMSON, *WE THE JURY* 245 (1994). Although Abramson does not expressly identify himself as a feminist, his views on the jury are strikingly consistent with Nussbaum's "judicious spectator" and Minow's discussion of "empathy critics." I cite him here because he demonstrates that difference and more overtly communal views are not necessarily in conflict.

237. *Ballard v. United States*, 329 U.S. 187, 191 (1946). See also ABRAMSON, *supra* note 236, at 118–22 (offering a similar analysis of *Ballard* and expressly identifying *Ballard* as embodying a "difference" perspective).

[I]f the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.²³⁸

This quotation is a classic statement of a difference perspective: women change the nature of the community because they offer a distinct quality. Yet the focus is not on votes or outcomes. Rather, the focus is on deliberations, the "subtle interplay" of influence, the "flavor" of the debate. Indeed, the Court went on to explain how women would change that flavor. The Court noted that because most children "receive the first and most lasting teaching of religious truths from their mothers,"²³⁹ women might see Mrs. Ballard's fundraising activities with her son in a very different light than would men.

The *Ballard* Court's fusion of the difference perspective with the deliberative ideal has not always prevailed. There are more recent cases where the Court indeed viewed the jury as a forum for interest group politics.²⁴⁰

238. *Ballard*, 329 U.S. at 193-94.

239. *Ballard*, 329 U.S. at 194.

240. The most significant such case is *Taylor v. Louisiana*, 419 U.S. 522 (1975). In this case, Taylor appealed his aggravated kidnapping conviction to the Supreme Court on the ground that he was denied his constitutional right to a trial by a representative segment of the community given the systematic underrepresentation of women on the jury list. The Court agreed, concluding that a nonrepresentative jury could not be an impartial jury. See *Taylor*, 419 U.S. at 530. But an "impartial" jury reflects the "diversely biased people" of our community. See ABRAMSON, *supra* note 236, at 122. Professor Abramson summarized the Court's reasoning thus:

In other words, impartiality was accomplished by turning the traditional search for disinterested jurors on its head: we should realistically admit that jury deliberation is but the interplay of group biases. Paradoxical as it sounds, the *Taylor* court was committed to the notion that the most impartial jury was the jury that most accurately reflected the mix of popular prejudices.

ABRAMSON, *supra* note 236, at 122. Thereafter, Abramson surveys other decisions showing a deep confusion in the courts over whether the difference or deliberative ideal should prevail. See ABRAMSON, *supra* note 236, at 122-41. The most recent example of this confusion at the Supreme Court is *J.E.B. v. Alabama*, 511 U.S. 127 (1994). *J.E.B.* held that intentional discrimination by state actors on the basis of gen-

Moreover, some well-publicized cases in which juries voted or split along racial or gender lines seem to call the deliberative ideal into question.²⁴¹

der in exercising peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. See *J.E.B.*, 511 U.S. at 130–31. The majority at first seemed to support the deliberative ideal, quoting *Ballard* favorably and at length. See *J.E.B.*, 511 U.S. at 133–34. Moreover, the Court suggested sensitivity to the need for many voices in deliberation by stressing its appreciation “for the value of women’s contribution to civic life.” *J.E.B.*, 511 U.S. at 134. That need was reinforced by the Court’s historical survey of the exclusion of women from juries. See *J.E.B.*, 511 U.S. at 131–36. But, rather than expressly relying solely on the argument that women’s voices are needed to promote a deliberative exchange of many views, the Court stressed the perceived absence of evidence of any significant differences in jurors’ views due to their gender. See *J.E.B.*, 511 U.S. at 137–38 n.9. The idea of such differences was bemoaned as stereotyping. See *J.E.B.*, 511 U.S. at 138. Jurors should be excluded based on discoveries of “actual or implied bias,” but such bias should not automatically be assumed based on gender. *J.E.B.*, 511 U.S. at 143. This emphasis on bias arguably sounds more like a group-conflict conception of the jury.

Ultimately, the apparently conflicting language in the opinion can be resolved. Even the *Ballard* Court, in adopting the deliberative ideal, acknowledged that neither women nor men necessarily act as a class. See *Ballard*, 329 U.S. at 193. It would be wrong, therefore, to exclude individuals based on a presumed gendered group bias. It would certainly be wrong to assume that a potential juror is more likely to vote for a particular outcome based on his or her gender. But these observations are perfectly consistent with believing that a group on average brings new insights, which creates a more informed deliberation. Permitting the exclusion of an entire group (women) by peremptories would deprive the jury of those insights.

Other concerns beyond the group-conflict versus deliberative ideals played large roles in the Court’s reasoning as well. In particular, the Court worried about “externalities”—costs imposed by courtroom participants on those not involved in the trial. See TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 15 (defining externalities). Thus, the Court feared that stereotypical abuse of peremptories would “ratify and reinforce prejudicial views of the relative abilities of men and women.” *J.E.B.*, 511 U.S. at 140. The message sent within and beyond the courtroom would be one of female inferiority. See *J.E.B.*, 511 U.S. at 142.

Most of the concurring and dissenting opinions seemed, however, to favor a group-conflict theory. Justice O’Connor’s concurring opinion expressed a belief in gender-linked, result-oriented biases and viewed peremptories as a way of eliminating extremes of partiality. See *J.E.B.*, 511 U.S. at 146–51 (O’Connor, J., concurring). Justice Kennedy’s, concurrence stressed that the idea of a jury representative of the community is merely “a structural mechanism for preventing bias.” *J.E.B.*, 511 U.S. at 154 (Kennedy, J., concurring). Justice Rehnquist’s dissent, also stressed gendered biases, see *J.E.B.*, 511 U.S. at 154–57 (Rehnquist, J., dissenting), and Justice Scalia’s dissent, joined by Justices Rehnquist and Thomas, stressed gendered bias, group-based conflict, and partiality as central to jury functioning. See *J.E.B.*, 511 U.S. at 156–63 (Scalia, J., dissenting).

241. For example, the officers who beat Rodney King were acquitted in their first trial by a largely white jury, and the original Erik Menendez jury hung along gender lines. See ABRAMSON, *supra* note 236, at 103–04.

Nevertheless, diverse juries rarely deadlock, and while demographic factors affect jury decisions, the empirical studies do not "show that jurors are so captivated by narrow group loyalties that they typically vote in blocs."²⁴² To the contrary, "when jurors of different ethnic groups deliberate together, they are better able to overcome their individual biases."²⁴³ The deliberative ideal holds.

Feminist critics thus view the jury as an opportunity for inter-group conversation creating a broader, communal whole. Furthermore, feminists trust the competence of suitably diverse juries to handle data.²⁴⁴ Indeed, part of the justification for diversity is that it brings new information and perspectives to bear, thereby improving the quality of debate and the accuracy of decisions. Feminists thus articulate both political and epistemological reasons for trusting the jury.²⁴⁵ A feminist approach to evidence law thus asks how we can "improve the quality and quantity of evidence, raise empathy, and promote reasoned deliberations," rather than how we can "protect ourselves from jury ignorance and confusion."²⁴⁶

C. *A Jury of Her Peers*

The feminist novella, *A Jury of Her Peers*,²⁴⁷ in part raises the question of what to do when feminist jury ideals fail, while at the

242. ABRAMSON, *supra* note 236, at 104.

243. Stanley M. Weisberg, *Out of the Frying Pan or into the Fire? Race and Choice of Venue After Rodney King*, 106 HARV. L. REV. 705, 709 (1993); see also ABRAMSON, *supra* note 236, at 104 (evaluating the empirical data).

244. See GODFREY D. LEHMAN, *WE THE JURY: THE IMPACT OF JURORS ON OUR BASIC FREEDOMS* 18, 24-25 (1997).

245. See Minow, *supra* note 220, at 20-23.

246. The feminist version of the core question of evidence law articulated here follows from Nussbaum, Minow, and Abramson's emphases on empathy, an informed judicious spectator, and a diverse, deliberative jury. See *supra* notes 220-45 and accompanying text. The "jury ignorance and confusion" alternative follows from the deep distrust of the jury expressed in Popperian readings of *Daubert*. See *supra* notes 11-13 and accompanying text. For a compelling recent argument that the framers had a communal conception of the jury as a "breeding ground for good citizenship," a check on governmental power, and a source of particularized justice (a vision similar to but not identical with the feminist empathic vision), see AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 54, 66, 110 (1998).

247. Susan Glaspell, *A Jury of Her Peers*, in *LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES* 124 (E. Gemmette ed., 1992). The summary of the plot here closely tracks that in WEST, *supra* note 28, at 242-58.

same time further elucidates those ideals. This novella involves the investigation of a farmer's murder. The farmer was strangled to death by a rope. His wife is the chief suspect. The story opens with the murder being investigated in the farmer's home by the sheriff, a neighbor, and a prosecutor. These three men have brought two women with them: the sheriff's and the neighbor's wives. The two women chat in the kitchen while their husbands search the house looking for evidence of a motive. The men ignore the kitchen, concentrating their search on what they see as more likely places, such as the bedrooms and the barn. The women end up finding evidence in the kitchen.

[Their] attention is drawn to domestic items, such as sewing; they quickly notice that the woman's usually careful stitching went terribly awry at one point, as if she had suffered some shock. Eventually, their affinity with a homemaker's world leads them to a sewing box, in which they find a dead canary, its neck broken in quite the same way as the husband's.²⁴⁸

To the women, the evidence reveals a severely disturbed and abusive marital relationship. The women view this evidence, however, as *exculpatory*, not *inculpatory*. In the women's view, the murder was justified or excused. This metaphorical jury of the wife's peers acquits her, hiding the evidence to ensure against a less well-informed body missing the truth.²⁴⁹

The women's extraordinary sense of empathy for another and their ability to craft a persuasive tale from an understanding of male-female relationships and everyday particularities are reminiscent of Nussbaum's judicious spectator.²⁵⁰ The unique knowledge and sensibilities that lead the women to find evidence that the men overlook seems to embody difference-theorist insights. The women's wide-ranging conversation and exchange of ideas additionally reflect the deliberative ideal. Furthermore, it is the women's free access to information and ability to understand its meaning and probative value that enables them to solve the crime.

248. ABRAMSON, *supra* note 236, at 120 n.*.

249. See ABRAMSON, *supra* note 236, at 120 n.* (offering a similar reading of the story); WEST, *supra* note 28, at 243 (same).

250. See *supra* text accompanying notes 158–77.

But the women do not wholly embrace the empathy critics' perspective. They have doubts about the ability of the dominant group, men, to understand the situation if fully informed, so the women hide the evidence. Only peers (in-group members) can do justice.²⁵¹

That caution indeed has animated some feminist evidentiary reforms.²⁵² And the concerns the novella raises—that “outsiders” may sometimes have trouble understanding another’s pain—must continue to be borne in mind. But feminism, because it envisions the possibility of change, is fundamentally optimistic.²⁵³ Feminism is also *realistic*: it recognizes that men will likely dominate all institutions of justice, from the legislature to the bureaucracy and the judiciary.²⁵⁴ Accord-

251. See ABRAMSON, *supra* note 236, at 120 n.*.

252. Rape shield laws, which keep a woman’s sexual history from the jury, for example, can be seen as an effort to reduce the chances that men and ideologically-blinded women will judge rape victims with the cognitive blinders of patriarchy. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 389–94, 404–33.

253. See, e.g., FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN’S MOVEMENT IN AMERICA SINCE 1960*, at 493 (1991) (“[G]iven the enormous resistance to change over the past thirty years and what feminists have been able to accomplish in spite of it, prospects are good. As long as there’s a strong women’s movement, further progress is inevitable.”).

254. See generally Katharine T. Bartlett & Rosanne Kennedy, *Introduction*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 1–11 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991) (discussing a variety of approaches of different “feminisms”). Of course, men might seek to dominate the institution of the jury too. Cf. TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 15 (discussing the on-average differences in male/female speaking styles that sometimes enable men to dominate women in public discussions). Rules like Federal Rule of Evidence 606(b), which generally prohibit inquiries into what happened in the jury room, will make such efforts at dominance hard to ascertain. Nevertheless, a diverse jury is a relatively less hierarchical, more communal institution than the alternative—decision by a judge. The jury, unlike the judge, consists of laypersons, not legal experts who purport to hold an arcane knowledge unavailable to ordinary folk. Moreover, precisely because they are not legal specialists, these laypersons will not have developed the cynicism or tendency toward easy professional categorization (“Oh, not another gunpoint robbery by an ‘innocent’ man!”) that judges may have developed, and thus will be more capable of empathy and individualized justice. Cf. RICHARD LEMPert & JOSEPH SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES, AND DISTRIBUTION* 75–78 (1986); Taslitz, *Myself Alone*, *supra* note 23, at 89. Furthermore, diverse viewpoints, including those of women, at least have a chance of being heard in a debate among community representatives, unlike the univocality of the single, distant guardian of the law, the trial judge. Additionally, communal, cooperative decision-making is highly valued by many feminist theorists who seek to honor on-average female/male differences in decision-making styles, differences that are arguably due to differing life experiences and circumstances. See TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 15. Finally, efforts might be made in jury selection and in jury instructions to create juries where male dominance is less likely. See *infra* text accom-

ingly, voir dire must be used aggressively to weed out juror prejudice, peremptories must be challenged where misused, and experts, who can reduce unwise roadblocks to empathetic detachment, must be sought.²⁵⁵ The gradual acceptance of BWS can thus be viewed as an effort to promote this last goal—unbiased juror empathy. BWS' possible fall can be attributed to the same source, a growing consensus that changes in our knowledge about battering and our understanding of sociopolitical reality require new ways to achieve jury empathy. But let there be no misunderstanding: creating unbiased, informed, contextual, communal judgment—faith in the feminist jury—remains the goal.

IV. LESSONS FROM THE BATTERED WOMAN SYNDROME

The BWS debate helps us to understand better the implications of narrative theory and the deliberative-jury ideal for a feminist evidence law. Expert testimony on general social and psychological processes can serve to further the jury's "fancy," bringing their interpretive scheme closer to the criminal defendant's or victim's. That goal is aided by jurors' learning about group identities and common group experiences.²⁵⁶ But that goal can rarely be adequately achieved without case-specific expert testimony about this person's life history and motivations.²⁵⁷ One sort of case-specific, expert testimony, the

panying note 255. Further elaboration of this last point is beyond the scope of this Article, but would likely track reforms that I have elsewhere suggested would be wise in rape trials, such as permitting an expanded voir dire focusing on certain personality traits or beliefs considered undesirable in fair jurors. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 496–500.

255. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 497–500 (suggesting use of these techniques in rape cases).

256. See, e.g., Orenstein, *No Bad Men!*, *supra* note 219, at 49–63 (advocating expanded expert testimony on the common experiences and reactions of rape victims and rape dynamics); Raeder, *Double-Edged Sword*, *supra* note 141, at 790, 816 (advocating expanded expert background testimony about the experiences of battered women and the dynamics of battering relationships); Taslitz, *Myself Alone*, *supra* note 23, at 25–29 (explaining the value of group character evidence).

257. See Taslitz, *Myself Alone*, *supra* note 23, at 14–29, 76–81, 91–100. My purpose in this Part is not to add yet another voice to the BWS debate. Indeed, I will rarely mention the BWS in this Part. Rather, my goal is to recount broader lessons for all social scientific evidence regarding mental state that can be gleaned from the BWS debates recounted *supra* Part II.B. More specifically, the continued support for BWS among many courts, legislators, and commentators, despite the weaknesses in the supporting Popperian social science and the partial reliance on clinical rather than

clinical psychologist's expert opinion, seeks to classify a person as fitting within a certain category—for example, those displaying the behaviors comprising BWS—and to articulate more individualized explanations of someone's character, thoughts, and feelings.²⁵⁸

I have elsewhere defended the occasional use of clinical testimony, subject to fairly rigid safeguards, which include (1) relying on multiple sources of data, not simply a single client interview; (2) the maintenance of careful database records; (3) a careful, case-specific examination of the plausibility of the hypothesis involved; (4) a review of any available supporting empirical data for its strengths and weaknesses; (5) a critical examination of clinical hypotheses by others in a properly trained clinical forensic team; (6) fully and fairly educating the jury about the testimony's value; (7) cautiously limiting opinions to probabilities and tendencies, not certainties; and (8) a demonstrated awareness by clinicians of how their own cognitive biases can affect their judgment.²⁵⁹ I will not repeat those arguments here but offer several observations.

only experimental opinion, raises questions about whether BWS can be of any value and, if not, whether alternative types of social science evidence on battering would be preferable. This Part argues that clinical testimony and non-Popperian social science can serve useful goals—acute observation, evidentiary richness, overcoming cognitive blinders, and identifying plausible alternative interpretations of human text. Popperian social science can serve these goals as well and has shed light on arguably sounder interpretations of battering. See *supra* Part II. The point, however, is that the Popperian flaws in BWS research should not automatically lead to its exclusion. Indeed, it may still be helpful in certain cases and, at an earlier historical moment, was probably wisely admitted. What may ultimately tip the scales against BWS is not the epistemological critique *per se* but the political one, supported by research suggesting a more plausible alternate way to interpret many battered women's situations. See *supra* Part II.B; *infra* Parts IV & V.

258. See Taslitz, *Myself Alone*, *supra* note 23, at 24–30, 93–102. Whether clinicians can in fact do these things is, of course, the subject of intense debate. Compare Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980) (clinicians can do these things), with Faigman, *To Have and Have Not*, *supra* note 115, at 1072–78 (deriding most clinical judgment as “suppositional science”). I have fallen on the Bonnie and Slobogin side of the debate, arguing that under certain very case-specific conditions, we should admit clinical testimony, even sometimes when it is mere “suppositional science.” See Taslitz, *Myself Alone*, *supra* note 23. The question is ultimately one of the “plausibility” of the clinician's claims, a notion I will revisit in the companion piece to this one.
259. See Taslitz, *Myself Alone*, *supra* note 23, at 73–83. Videotaping interviews, using any available actuarial formulae, narrowing opinions to the relevant situations in which they have the most power, and stating the level of confidence in an opinion are additional safeguards. See Taslitz, *Myself Alone*, *supra* note 23, at 73–83.

A. *The Acute Observer*

My earlier piece addressed the clinical judgment of psychologists, particularly regarding character evidence. But many of the arguments that I raised there can be more broadly applied to any social science evidence relevant to mental state. For example, one of the things that social science experts bring to the table that laypersons do not is a keener talent at observation.²⁶⁰ Thus forensic linguists—who study the use of ordinary conversation in speech events relevant to the law²⁶¹—can offer helpful observations regarding speech crimes—bribery, terroristic threats, conspiracy and perjury.²⁶²

[L]inguists know what to listen for in a conversation. They listen for topic initiations, topic recycling, response strategies, interruption patterns, intonation markers, pause lengths, speech event structures, speech acts, inferencing, ambiguity resolution, transcript accuracy, and many other things. Scientific training enables linguists to categorize structures that are alike and to compare or contrast structures that are not. Linguists understand the significance of context in the search for meaning in a conversation and are unwilling to agree with interpretations wrenched from context by either the prosecution or the defense.²⁶³

In one case, the defendant, a chemical manufacturer, was charged with conspiring to find a pill press to aid a drug dealer.²⁶⁴ The suspect's defense was that he was so uncomfortable, when he finally realized what the other party had proposed, that he sought only to get

260. See Taslitz, *Myself Alone*, *supra* note 23, at 94.

261. See ROGER W. SHUY, *LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM* at xv–xxii, 200–05 (1993).

262. See SHUY, *supra* note 261, at xviii–xix.

263. SHUY, *supra* note 261, at xviii.

264. See SHUY, *supra* note 261, at 162–73 (summarizing the facts and arguments recounted here concerning the “Dean Brewer case”). I use this case from Shuy’s book because it effectively illustrates the power of experts to observe closely and describe social conduct. Professor Shuy is vague about the data sources drawn on for his ultimate conclusion that no real promise or conspiratorial agreement had been made. That vagueness is likely due to the nature of his book—an effort to popularize the insights of forensic linguistics, rather than to reach a professional audience of linguists. Therefore, I express no opinion regarding whether his testimony in the case would, overall, be helpful to a jury.

out of the conversation. His audiotaped statements did not, therefore, reveal his agreement to anything.

A linguist was able to explain why the early offers were ambiguous (thus explaining why the listener would participate for so long), and to point out why social politeness rules would make it hard for the listener to extricate himself from the conversation. Similarly, the linguist noted that the listener-defendant brought up only fifteen percent of the topics raised, spoke only fifteen percent of the words used, and spoke in much shorter utterances than did the primary speaker. Furthermore, most of the listener's turns at talk were one-word utterances, largely feedback markers, "uh-huh," "yeah," "hmm," "oh," "okay," and "man." These tactics were arguably efforts of the listener to distance himself from the conversation without alienating the primary speaker.

The only direct statement of agreement by the listener was in offering to "check around" in direct response to the speaker's asking where he could get a pill press. But eight days later, in a second conversation, the listener simply reports, "I haven't had any luck." This lack of specificity about where and how he looked, about his prior experiences with or contacts in locating pill presses, and his lack of enthusiasm or elaboration, are the kind of hollow offers—like "Let's get together for lunch sometime"—that we often use to end uncomfortable exchanges quickly.²⁶⁵ This combination of close observation of the defendant's speech with background information on the socio-dynamics of ordinary conversation offered a plausible alternative to the prosecution's conspiracy theory.²⁶⁶

265. See SHUY, *supra* note 261, at 172.

266. A jury never had a chance, however, to render its judgment on Shuy's theory. Despite the confidence of Shuy and Brewer's attorney, Brewer ultimately pled "guilty to minor charges rather than face the trauma of the courtroom." SHUY, *supra* note 261, at 173.

Note too that Shuy's testimony included both what ordinary persons would consider simple observations and more overt theory-based opinions. For example, Shuy does more than describe the percentage of topics raised and words used by the defendant. He explains the theory (and its basis) that such techniques are used by speakers to distance themselves from others, and he opines (and gives his reasons therefor) that the defendant was attempting such distancing. See SHUY, *supra* note 261, at 162–73. I argue that Shuy's observations would be meaningless to the jury without such opinions. There is, however, a healthy debate about whether social scientists, such as psychiatric clinicians, should be able to include opinions, explanations, and inferences with their observations. For a summary of that debate and a more extended statement of why I sometimes side with those favoring offering the opinions, see Taslitz, *Myself Alone*, *supra* note 23. See also *infra* note 320

B. Evidentiary Richness

Social scientist expert witnesses often repeat the first-hand testimony of lay witnesses. A battered woman and family members might choose to testify about the defendant's history of battering his wife. Yet a psychologist would necessarily need to repeat those incidents as bases for her testimony.²⁶⁷ Moreover, such a witness might, based on a combination of admittedly incomplete or flawed empirical data and psychological theories, observations, and tests, opine about the kinds of psychological reasoning processes and social pressures that would offer one plausible, consistent explanation of the woman's behavior.²⁶⁸ Why ever admit testimony that is repetitive and offers opinions based on either inconclusive empirical data or the kinds of individualized judgments that empirical, Popperian science so abhors?²⁶⁹ The answer lies in the narrative coherence of human lives. Nevertheless, we must be cautious in admitting such testimony and subject it to the kinds of safeguards noted above.

The U.S. Supreme Court recently recognized why this is so in *Old Chief v. United States*.²⁷⁰ In that case, Old Chief was charged with, in addition to assault and weapons charges, violating 18 U.S.C. § 922 (g)(1).²⁷¹ That section makes it a crime for anyone convicted of a felony to possess any firearm. Old Chief offered to stipulate to his having a prior felony conviction, arguing that this "rendered evidence

(explaining why jurors are unlikely to be intimidated by social scientist's recitation of their conclusions). I do not address whether there might be "ultimate issue rule" problems with testimony like Shuy's, for I see such problems largely as a matter of phrasing and presentation, rather than any serious substantive limitation on expert testimony. See FED. R. EVID. 704(b) (stating that an expert testifying about a criminal defendant's mental condition may not state an opinion on whether the defendant had a mental state that is an element of the crime or defense); *United States v. Masar*, 896 F.2d 88, 93 (5th Cir. 1990) (holding that Rule 704(b) applies to "only a direct statement on the issue of intent").

267. See, e.g., Taslitz, *Myself Alone*, *supra* note 23, at 14-44 (describing the bases for "psychological character evidence"). For a discussion of the differing views about whether, when, and for what purposes an expert may recite the bases for his opinion, see Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 471-80 (1996).

268. See Taslitz, *Myself Alone*, *supra* note 23, at 91-98 (discussing suppositional science, plausible alternatives, and storytelling in the courtroom).

269. See Taslitz, *Myself Alone*, *supra* note 23, at 91-102 (responding to the Popperian critique of clinical judgment).

270. *Old Chief v. United States*, ___ U.S. ___, 117 S. Ct. 644 (1997).

271. See *Old Chief*, 117 S. Ct. at 646.

of the name and nature of the offense [assault causing serious bodily injury] inadmissible" because of the risk of unfair prejudice.²⁷² The prosecutor refused to so stipulate, and the trial court denied Old Chief's motion to limit any testimony about his prior conviction to the information offered in his stipulation.²⁷³ The name and nature of his prior conviction were revealed at trial, and a jury convicted Old Chief on all counts.²⁷⁴ The Ninth Circuit, on appeal, found no abuse of the trial judge's discretion.²⁷⁵

The Supreme Court disagreed, reversing the judgment of the Ninth Circuit.²⁷⁶ The Court did so, however, only because of its conclusion that the testimony about the defendant's prior conviction added no "evidentiary richness" to the stipulation.²⁷⁷ Given the dangers of jury misuse of the prior assault conviction's details as inappropriate character evidence, unfair prejudice substantially outweighed probative value and required exclusion of the details under Federal Rule of Evidence 403.²⁷⁸ The Court's concept of "evidentiary richness" echoes many of the themes in this Article. The Court's discussion of the point is thus worth an extended quotation:

[M]aking a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the

272. *Old Chief*, 117 S. Ct. at 646.

273. *See Old Chief*, 117 S. Ct. at 648.

274. *See Old Chief*, 117 S. Ct. at 648.

275. *See Old Chief*, 117 S. Ct. at 649.

276. *See Old Chief*, 117 S. Ct. at 649.

277. *See Old Chief*, 117 S. Ct. at 651, 655-56.

278. Interestingly, the Court rejected an atomistic Rule 403 evidence analysis, one that would view proffered evidence "as an island," in favor of a more holistic, contextual approach. This latter approach, fully consistent with feminist theory, looks to the relationship among a proffered piece of evidence, alternative forms of proof available, and "evidentiary richness." *See Old Chief*, 117 S. Ct. at 651.

willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and the particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.²⁷⁹

The Court goes on to explain that jurors may find it difficult to either send another human being to prison or hold out for acquittal. But the Court said:

When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.²⁸⁰

Moreover, the Court concluded that jurors' expectations of receiving certain evidence, and in a certain form, might be violated by a stipulation. Failed expectations create the impression that the prosecutor is "cloaking something" when he is not.²⁸¹ "A syllogism is not a story," said the Court, "and a naked proposition in the courtroom may be no match for the robust evidence that would be used to prove it."²⁸² Jurors hearing a story interrupted by "gaps of abstraction" will be puzzled by "missing chapters."²⁸³ An assurance that the missing chapters are there is never more than second best.²⁸⁴

279. *Old Chief*, 117 S. Ct. at 653.

280. *Old Chief*, 117 S. Ct. at 653-54.

281. *See Old Chief*, 117 S. Ct. at 654.

282. *Old Chief*, 117 S. Ct. at 654.

283. *Old Chief*, 117 S. Ct. at 654.

284. *See Old Chief*, 117 S. Ct. at 654. For an interesting analysis of the tactical uses of "irrelevant evidence," and an argument that they are not completely irrelevant, compare David Crump, *On the Uses of Irrelevant Evidence*, 34 Hous. L. Rev. 1 (1997) (concluding that the Federal Rules of Evidence must be revised in order to adequately prevent the introduction of some types of irrelevant evidence), with Myrna S. Raeder, *Irrelevancy: It's All in the Eyes of the Beholder*, 34 Hous. L. Rev. 103 (1997) (commenting on Crump and offering other suggestions on how to better handle irrelevant evidence). While Crump seeks to minimize the use of such evidence, some of the uses he describes seem highly relevant to the concept of "evidentiary richness" articulated in *Old Chief*.

The same logic governs expert testimony, as the forensic linguist conspiracy case above illustrates.²⁸⁵ The jurors would readily hear the tape of the defendant's pill press conversation in the prosecutor's case in chief. At first blush, that conversation suggests a straightforward tale: a greedy chemical manufacturer seeks to cash in on the illegal drug market. But the heightened observational skills and specialized knowledge of the linguist fill in missing information not immediately heard by the untrained ear: the defendant's relative silence, his use of uncomfortable minimal responses, and his vague and terse answers to questions. When these observations are put into their social context—an understanding of linguistic politeness rules—a plausible alternative story is suggested. An uncomfortable, even frightened, man unsuccessfully tried to extricate himself from an unpleasant and dangerous conversation.

C. Overcoming Cognitive Blinders

Jurors need help to overcome cognitive blinders and social prejudices that crowd out alternative, liberating tales. Jody Armour explains that much racism results from unconscious, automatic, cognitive habits (stereotypes), rather than ill will.²⁸⁶ Yet empirical data on gender prejudice suggests that the effects of these habits can be mitigated for those whose conscious belief is that gender stereotyping is wrong.²⁸⁷ Armour concludes, therefore, that judges can reduce the effects of courtroom racism by excluding symbols that activate racial stereotypes, and making "rationality enhancing" group references throughout the trial.²⁸⁸ Such references "challenge the factfinders [sic] to reexamine and resist their discriminatory responses [to] enhance the rationality of the fact-finding process."²⁸⁹ Tentative evidence suggests that expert testimony can aid jurors in the latter task by alerting them to their own biases and prejudices.²⁹⁰ Experts are particularly helpful because some experimental data suggests little change in subjects' beliefs after merely being confronted with contrary discrediting

285. See James W. McElhaney, *Terms of Enlightenment: Articulate Experts Help Jurors Visualize Facts*, 83 A.B.A. J. 82-83 (1997), for an argument that an expert's most important role is as a storyteller.

286. See ARMOUR, *supra* note 94, at 130-41.

287. See ARMOUR, *supra* note 94, at 140.

288. See ARMOUR, *supra* note 94, at 147-53.

289. ARMOUR, *supra* note 94, at 149.

290. See ARMOUR, *supra* note 94.

information.²⁹¹ However, there is a significant effect on such beliefs when the subjects are given an explicit theoretical explanation of the mental processes that cause them to hang on to their flawed beliefs.²⁹² A feminist evidence law similarly uses experts to challenge inadvertent patriarchy to change their ways.

For example, Aviva Orenstein has proposed broader use of expert testimony on the dynamics of rape.²⁹³ Such testimony might include debunking certain rape "myths" relevant to the particular case.²⁹⁴ The expert would articulate in detail what evidence refutes these myths and why.²⁹⁵ Perhaps most importantly, the expert would explain the "*psychological pull of the cultural paradigm*," that is, why we often remain in the grip of these myths even when they are refuted.²⁹⁶

D. Valuing Interpretive Social Science

The importance of stories as ways of conveying human meaning and aiding jurors' interpretive task argues for the relevance of interpretive ("hermeneutic") social science, in addition to its causal and rational-choice cousins. Interpretive social science is concerned not with objective causal processes, but with the meaning of human actions.²⁹⁷ Such social science explicitly treats social phenomena as texts to be interpreted.²⁹⁸ This hermeneutics of human action is based on a "feeling for the individuality and uniqueness of persons; it is a way to understand the inwardness of the other."²⁹⁹ Hermeneutic social science thus purports to offer insight into the uniqueness of the individual. Yet hermeneuticists also claim to offer generalizable insights. Thus, a case study investigating a small number of naturally-occurring (rather than research-created) cases may be viewed as typical of similar cases or as the basis for a more general theory.³⁰⁰

291. See Taslitz, *Myself Alone*, *supra* note 23, at 112 & n.635.

292. See Taslitz, *Myself Alone*, *supra* note 23, at 112 & n.635.

293. See Orenstein, *No Bad Men!*, *supra* note 219, at 45-61.

294. See Orenstein, *No Bad Men!*, *supra* note 219, at 57-58.

295. See Orenstein, *No Bad Men!*, *supra* note 219, at 57.

296. Orenstein, *No Bad Men!*, *supra* note 219, at 57.

297. See DANIEL LITTLE, *VARIETIES OF SOCIAL EXPLANATION* 68-69 (1991).

298. See LITTLE, *supra* note 297, at 71.

299. DIESING, *supra* note 115, at 106.

300. See MARTYN HAMMERSLEY, *WHAT'S WRONG WITH ETHNOGRAPHY?* 5-6 (1992).

For example, Jennifer L. Pierce conducted one type of case study, an ethnography of legal practice.³⁰¹ Professor Pierce worked for six months in a law firm and nine months in a corporate legal department as a paralegal. She also attended a three week National Institute of Trial Advocacy Training Course for litigators. Finally, she supplemented this participant-observer field work with sixty interviews of randomly sampled lawyers and paralegals.³⁰²

Professor Pierce concluded that male lawyers used "boundary heighteners" to exaggerate their differences from the subordinate group, female attorneys.³⁰³ Thus, male lawyers turned social events into competitions over who could drink the most beer, for example, and talked about sports. Partners routinely mistook female associates for secretaries. Subtle and not-so-subtle sexual harassment of those associates was also involved. Moreover, Professor Pierce concluded that women lawyers faced a double-bind: they were branded as overly aggressive and shrill if combative, weak if more relational.³⁰⁴

Yet, male associates were praised for their "hard-ball" tactics. Males also laughed at women lawyers who told tales of their aggressive behavior, serving thereby to put the women in a one-down position.³⁰⁵ Many of the women preferred, in Professor Pierce's view, a more relational, caring style of lawyering, one not tolerated by the men.³⁰⁶

Among Professor Pierce's conclusions was that these tactics treated women lawyers as having a lower social and professional status than male lawyers.³⁰⁷ As a consequence, women were often systematically blocked from many of the resources necessary for, and indicative of, success.³⁰⁸ By comparing her research with other case studies and with historical and theoretical work, Professor Pierce portrayed her study as representative of much of legal practice. Consequently, she recommended radical changes in the structure of legal practice and of employment law.³⁰⁹

301. See JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 17-22 (1995).

302. See PIERCE, *supra* note 301, at 17-22.

303. PIERCE, *supra* note 301, at 107.

304. See PIERCE, *supra* note 301, at 106-39.

305. See PIERCE, *supra* note 301, at 106-39.

306. See PIERCE, *supra* note 301, at 106-39.

307. See PIERCE, *supra* note 301, at 177.

308. See PIERCE, *supra* note 301, at 176-81.

309. See PIERCE, *supra* note 301, at 181-87. The changes that Professor Pierce recommended include (1) the introduction of courtesy as a valued worker trait; (2) expanding the scope of Title VII gender-based harassment to include nonsexual, but

This illustration demonstrates the important distinction between "surface" and "depth" hermeneutics in interpretive social science. "Surface" hermeneutics refers to a person or group's overt messages.³¹⁰ "Depth" hermeneutics refers to concealed messages.³¹¹ Messages may be concealed because we are unaware of all the messages that we send, we seek to "pretty them up," we give oversimplified accounts, or we do not trust the observer.³¹² Professor Pierce uncovered a deep message sent by male to female lawyers: "We have higher social status than you; you must, therefore, not try to rise above your station." Professor Pierce, of course, went beyond merely identifying the message, finding that it also played a causal role in female subordination.³¹³

Generalizing from any one study is, of course, risky. Hermeneutic social scientists will sometimes do so, even though the far better practice is to reach conclusions based on numerous studies, combined with whatever experimental, quasi-experimental, and other data sources are both feasible and available.³¹⁴ A Popperian might scoff at relying on even numerous interpretive case studies as little more than accumulated anecdote. Yet, the Supreme Court has been quite willing to engage in normative constitutional fact-finding based on anecdote

systematic forms of gender disparagement, exclusion, and hostility; and (3) replacing the adversary system's "master-slave" ethic with a practice of law that is "egalitarian, respectful of difference, and empowering." PIERCE, *supra* note 301, at 181-87. Interestingly, if the second of these changes were adopted, studies like Pierce's would become relevant in employment litigation to show the discriminatory effects of an adversarial work environment. The issue for a trial court would then be whether Pierce's study and others like it are "reliable" under *Daubert*.

310. See DIESING, *supra* note 115, at 107.

311. See DIESING, *supra* note 115, at 107.

312. See DIESING, *supra* note 115, at 125-28. Psychoanalysis, so derided by Karl Popper, is viewed by some analysts as a legitimate form of depth hermeneutics. See DIESING, *supra* note 115, at 129-38, 143. Popper had his own hermeneutic theory, based on assumptions of radical methodological individualism and human rationality. See DIESING, *supra* note 115, at 143. Some theorists have argued that modern hermeneutic philosophies of social science are compatible in many ways with Popper's scheme if these particular aspects of Popper's theory are discarded. See DIESING, *supra* note 115, at 143. While my companion piece will be critical of Popper, that piece will argue that a softer version of Popperianism can offer us useful insights.

313. See DIESING, *supra* note 115, at 107-13, 137-42.

314. See HAMMERSLEY, *supra* note 300, at 86-91, 183-97 (stating the guidelines for generalizing from case studies); Taslitz, *Myself Alone*, *supra* note 23, at 100-02 (discussing the necessity of viewing a case study in the context of experimental and other sources of data as part of "converging lines of inquiry").

noteworthy for its "breadth and detail."³¹⁵ A feminist's trust of an informed jury's communal decision-making suggests a useful role for such "anecdote" at trial as well. Hermeneutic social scientists also agree that there are standards for separating good from bad interpretive social science. Riceour explains this as involving a "dialectic of guessing and validation," a new form of confirmation and refutation not based on either a propositional model or falsifiability.³¹⁶ This new model, in Riceour's view, is more like a transformed version of textual criticism in the humanities.³¹⁷

How to judge the value of interpretive social science is discussed in the companion piece to this Article.³¹⁸ For now the point is simple: interpretive social science focuses on identifying plausible interpretations of human text. This focus is consistent with a feminist vision of the human mind as linguistic and narrative.³¹⁹ A feminist approach to social scientific evidence will thus display a natural affinity for the interpretive turn in social science.³²⁰

315. See Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 819 (1996).

316. Paul Rabinow & William M. Sullivan, *The Interpretive Turn: A Second Look*, in INTERPRETIVE SOCIAL SCIENCE: A SECOND LOOK 9 (Paul Rabinow & William M. Sullivan eds., 1987).

317. See Rabinow & Sullivan, *supra* note 316, at 9.

318. See Taslitz, *Feminist Approach Revisited*, *supra* note 7.

319. See *supra* text accompanying notes 52–107, 143–214.

320. One colleague, in reviewing a draft of this Article, contended that interpretive social scientists do not educate the jury but simply impose their views on the jury in authoritarian (and thus anti-feminist) fashion. That is not true. Interpretive social scientists should be barred from reciting any opinion without fully explaining the reasons therefor in a way that enables the jury to judge for itself whether the expert is right. Thus in our linguist example, the linguist must be able to point to any specific studies he relied on regarding speakers' social distancing techniques and must explain why they should be credited. He must further identify precisely what observations (such as the small number of topics raised and the use of feedback markers and ambiguous responses) support his opinion about the defendant's intentions and why. See Taslitz, *Myself Alone*, *supra* note 23, at 90, 113–16 (noting the importance of gauging the clinician's ability to educate the jury about the bases for his opinion). There is also little danger that such an expert's opinion will overwhelm the jury. To the contrary, there is much reason to believe that jurors are skeptical of social science experts, especially if offered by the defense. See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 6 VA. L. REV. 1109, 1178–84 (1997). For such experts to be persuasive, they must integrate their testimony with the case's specific facts in a way that provides a coherent narrative consistent with, and that makes sense of, the lay testimony. See Sundby, *supra* at 1179–81. Furthermore, jurors will not substitute the expert's judgment for the jurors' own. See Sundby, *supra* at 1179. Rather, the jurors must be able to understand

V. EVIDENTIARY POLITICS

This Article has sought to lay the foundation for a feminist approach to social scientific evidence. One core insight of such an approach was that mental state is an interpretive act rooted in the linguistic nature of thought and the narrative coherence of human lives. From that insight, this Article drew various conclusions regarding expert social scientific evidence about mental state: (1) experts regarding social context and juror cognitive blinders are essential to promoting fair verdicts; (2) both interpretive and Popperian social science may be useful; and (3) case-specific expert opinion, including the informed speculations of clinical psychologists, can sometimes be helpful. These conclusions and others made here all turn on a second crucial insight: all evidence law is political. This second insight requires further elaboration.

A. *Epistemic Power*

The political nature of evidence law inheres in the institution of the jury. All jurors, we have seen, bring preconceptions and cognitive schemes to their task.³²¹ Those preconceptions and schemes are rooted in cultural stories, class, race, and gender-based experience.³²² Consequently, members of different groups often share particular visions of reality.³²³ Evidence rules, I have argued, can affect which visions pre-

the evidence supporting the expert's view, evidence that must meet their independent common sense evaluation. See Sundby, *supra* at 1179-84 & n.156. This behavior is a far cry from obedient deference to an authoritarian master.

321. See *supra* notes 256-97 and accompanying text.

322. See ARMOUR, *supra* note 94, at 81-89, 130-47; Taslitz, *Patriarchal Stories*, *supra* note 15.

323. See *supra* note 182 and accompanying text. My position is not an essentialist one. Each person is unique. Furthermore, there is no single, essential African-American, Jewish, or Latino position on any one issue, nor for any of these groups is there a single worldview to which every group member subscribes. Nevertheless, partly by virtue of being a member of various groups, we are more likely to share certain experiences with other members that "outsiders" will not have. Life experience thus contributes to our worldview, and, on average, group members will share many perspectives. See BROWN, *supra* note 92, at 42 ("[G]roups have varying ways of viewing the world; they hold different values and attitudes; and, in the last analysis, they behave quite uniquely."). Moreover, our self-concept usually includes identification with certain groups precisely because we see their experiences, goals, values, or attitudes as different. See, e.g., TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 26-30, 185-88 (1997) (discussing why people identify with groups). Our

vail, or even whether one vision, rather than another, is heard at all. Visions that prevail with any consistency will thus assist one group in accumulating social resources, like physical freedom, money, and other kinds of power—often at another group's expense.³²⁴ This type of power, what I call "epistemic" power, defines what is real.

Evidence rules have epistemic political power because they affect which social visions of reality prevail and who benefits thereby. Robert Mosteller has illustrated what I am calling epistemic power in the context of the battered woman syndrome:

[E]ven though the precise elements of BWS are uncertain and some aspects of the syndrome's scientific foundation remain weak or unproven, judges and legislators believe BWS to be better than the existing ignorance of jurors. The social reality facing battered women is not a matter that can be excluded from jury consideration. With or without expert testimony, that reality—or a stereotypical distortion of it—will be a part of the jury's reasoning process. Leaving jurors to their untutored biases in this situation is not particularly inviting, and even an incomplete scientific examination of the issue is likely to be superior. The general perception is that the science is sufficient to support the intuition of judges, legislators, scholars, and much of the public that the experience of women who have been battered renders reasonable much that jurors often find unreasonable.³²⁵

uniqueness comes from our own particular combination of group experiences and identifications and that unique set of genes and experiences that only we have. Understanding any individual, therefore, requires understanding his or her group memberships, unique life experiences, and special inherited traits.

324. See *supra* text accompanying notes 178–95.

325. Mosteller, *supra* note 124, at 487. Even where we lack empirical data on what jurors' "untutored biases" are, there are trustworthy humanistic alternatives for identifying those biases, such as the exploration of philosophy, history, legal precedent, and various manifestations of high and popular culture. See Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15, 17–42 (1990) (proving without empirical data that judges and juries hold a mythic belief in the infallibility of dog-scenting evidence). Professor Raeder also seems to agree with Professor Mosteller that even an "incomplete scientific examination" is sometimes good enough. See Raeder, *Double-Edged Sword*, *supra* note 141, at 793–97 (favoring certain uses of BWS, despite methodological flaws, because the large amount of supportive anecdotal evidence being gathered will allow a clearer look at the issues involved).

Mosteller is only expressly addressing the first aspect of epistemic power—the power to define social reality—while implicitly addressing the second—the power to funnel resources to a particular group, here, women. Yet Mosteller sees his task as rooted in traditional evidentiary notions of accuracy: “BWS evidence on balance,” he says, “helped produce more accurate results than would have resulted from its exclusion, given the limits of our ability to understand and describe social phenomena, the magnitude of the problem of domestic violence, and the requirement that cases be decided without delay.”³²⁶

But how does he know that the results achieved with BWS are more “accurate”? He cannot travel back in time to observe earlier events in decided cases, even if it were then possible to “see” the woman’s mental state. And he concedes that, by Popperian standards, the scientific foundations of much of BWS “remain weak or unproven.” He objects to jurors’ “untutored biases,” but why is their preconceived notion of social reality any worse than the BWS alternative? His answer is simply that the BWS voice must be heard because the admittedly flawed science (from a Popperian perspective) is seemingly adequate when combined with elite and popular “intuition” that BWS embodies the “experience of women who have been battered.”³²⁷

“Intuition,” however, is based on worldview. Furthermore, trusting what, from a particular perspective, is flawed science requires either an alternative view of when scientific data is trustworthy (is “knowledge”) or a belief that the other side bears the burden of showing that it is not.³²⁸ Additionally, Mosteller makes the essentially moral argument that the BWS version of battered women’s experience renders conduct “reasonable” that would otherwise be seen as “unreasonable.” Mosteller’s entire argument is thus over whose vision of social reality should prevail, that is, who should have epistemic power.

Mosteller is therefore wrong to concede that political considerations are at work in BWS case law, and yet to apologize for that fact by justifying BWS on purportedly traditional evidentiary grounds of “accuracy.” He apparently does so because he is bound by a realist

326. Mosteller, *supra* note 124, at 515 n.181.

327. Mosteller, *supra* note 124, at 487.

328. See Taslitz, *Feminist Approach Revisited*, *supra* note 7; *supra* text accompanying notes 19–25.

epistemology.³²⁹ Yet we have just seen that in this task he has failed, for he has implicitly recognized the socially constructed nature of cognitive reality in his argument.

His ambivalence also leads him to shy away from embracing the raw power aspect of his argument: BWS heightens women's voices in the public arena, giving them more social and economic resources than would otherwise be the case.³³⁰ Instead, he blames this aspect of the BWS legacy on the impersonal decisions of third parties—courts and legislatures.³³¹ But he should personally embrace this outcome with enthusiasm, rather than with distanced reluctance, for reasons that will soon be clear.

He explains that his reluctance springs from a fear that the raw power aspects of politicizing evidence law will spread like a virus, in-

329. Mosteller does not expressly address his underlying epistemology. He does, however, at times recognize that values play a role in fact-finding. See Mosteller, *supra* note 124, at 489–90. And he obviously understands the role of preconceptions as well. See Mosteller, *supra* note 124, at 487. But he seems to interpret these observations largely as bars to finding a single, apolitical truth; politics enters only because of our limited empirical data for proving this truth. See Mosteller, *supra* note 124, at 481 (noting what he sees as the virtual impossibility of conducting controlled experiments on battering). Thus he concludes, "Society may justifiably believe that the vast majority of women who die at the hands of their male domestic partners are the ultimate victims of widespread battering and that these women are largely, if not entirely, guiltless." Mosteller, *supra* note 124, at 486. Moreover, his ambivalence about extending political concerns to other areas of evidence law seems to stem from fears of wrongful or unsupported convictions of defendants for *acts* they did not commit. See Mosteller, *supra* note 124, at 510–16. In short, he seems reluctant to leave the realist's world, failing fully to recognize the interpretive nature of the human mind and the necessary implications of his otherwise insightful analysis.

330. Mosteller does appreciate how the distribution of resources affects, and is affected by, evidence rules. Thus, he decries many proposals to relax traditional evidentiary bars as stemming from political movements that endanger politically weak minorities who face the forces of anti-crime majorities. See Mosteller, *supra* note 124, at 510–16. He sees BWS legislation as a way to help a particular oppressed group, battered women. See Mosteller, *supra* note 124, at 486. But he does not expressly take the next step: he does not recognize that the suffering of battered women is one mechanism by which all women are oppressed by patriarchy. See, e.g., Laura L. O'Toole & Jessica R. Schiffman, *Preface*, in *GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* at xi–xiv (Laura L. O'Toole & Jessica R. Schiffman eds., 1997). Indeed, the everyday operation of such mechanisms constitutes patriarchy. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 402–04. Our epistemic judgments thus necessarily have broad implications for political relationships among various, often large, social groups.

331. See Mosteller, *supra* note 124, at 484–91, 495 (repeatedly describing the admissibility of BWS as a political and social judgment made by courts and legislatures, while being unclear or ambivalent about the extent to which he personally views that judgment as a wise one).

fecting relatively healthy organs of the body politic.³³² Thus, he is troubled by proposals such as those creating new hearsay exceptions for statements by certain victims of sexual or domestic violence and new pro-admissibility rules for expert testimony on battering profiles.³³³ But these reforms largely seek to prove *acts*. I am arguing only for a healthy embrace of epistemic politics when proving mental state. These proposed reforms concerning the proof of criminal acts may or may not be justified on other grounds, but because they involve a realist epistemology—Johnny either hit his wife or did not—political concerns deserve less weight.

B. Interest Group Politics

Mosteller also inadequately distinguishes (though he senses the distinction) between epistemic and interest group politics.³³⁴ Epistemic politics involves an intellectual debate over what versions of social reality deserve a voice in the courtroom. The pragmatist's version of epistemic politics recognizes that what is right in a particular case can be determined without a universal theory of what is right.³³⁵ Ideally, then, judges should exercise guided discretion in determining what "truths" are plausible.³³⁶ While values and worldviews (and thus politics) unquestionably enter into this analysis, the judge should endeavor to root those values and worldviews in more than personal biases. Judges should be candid about what values and views they find plausible and why.³³⁷ They should follow the guidelines noted here for when an interpretation is plausible.³³⁸ Judges engage in analogous tasks everyday: they rely on policies, values, and history, purportedly rooted in authoritative sources beyond their own raw power, in creating and

332. See Mosteller, *supra* note 124, at 509–16.

333. See Mosteller, *supra* note 124, at 509–16.

334. He does note in a footnote that politics can include both a "moral component" and "the exercise of self-interested power by groups," Mosteller, *supra* note 124, at 465 n.15, but he does not further develop the distinction. He also fears majoritarian politics, but by not clearly distinguishing interest group and epistemic politics, he seems to reject both as playing any desirable role in evidence law beyond certain narrow exceptions. See Mosteller, *supra* note 124, at 509–15. The former should (where possible) be rejected, while the latter should not.

335. See Taslitz, *Interpretive Method*, *supra* note 113, at 390.

336. See Taslitz, *Interpretive Method*, *supra* note 113, at 395–99 (arguing for guided discretion in trial judge interpretation and application of evidence rules).

337. See Taslitz, *Interpretive Method*, *supra* note 113, at 399–401.

338. See Taslitz, *Feminist Approach Revisited*, *supra* note 7.

applying both statutory and common law.³³⁹ The task is one for which they are well-suited.³⁴⁰

The result may, of course, involve "raw power" in that one group may benefit or suffer. But who gains and who loses is often a legitimate part of legal analysis, as evidenced by the law of equal protection.³⁴¹

This whole process differs radically, however, from interest group politics. With interest group politics, various groups vie, typically to obtain benefits from the legislature using any legitimate (and sometimes illegitimate) tool available. Group competition may also extend to any other decision-making body, beside the legislature, with resources worth seeking.³⁴² One group might, for example, offer to support or to oppose a legislator's re-election in exchange for a good result. Another group may offer to trade its future support for legislation X in exchange for the legislator's present support of legislation Y. Bargaining rules the day.³⁴³ Sometimes the most powerful group is the majority, and it takes a highly principled (or lame duck) legislator to fight clear majority will.³⁴⁴ If courts engage in this kind of interest group politics, they will indeed fail in their role "as a brake on popular sentiment," as Mosteller worries.³⁴⁵

Openly meditating, however, on whether jurors misperceive the life experience of victims and suspects should not delegitimize the courts, nor should candid concern that an oppressed group's voice will

339. See Taslitz, *Interpretive Method*, *supra* note 113, at 353-54, 360-95.

340. See Taslitz, *Interpretive Method*, *supra* note 113, at 390-401.

341. See JOHN E. NOVAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3 (5th ed. 1995) (discussing the Court's application of strict scrutiny to many equal protection violations in which a "suspect class" suffers).

342. See Taslitz, *Interpretive Method*, *supra* note 113, at 355-57, 372-78.

343. See Taslitz, *Interpretive Method*, *supra* note 113, at 355-57, 372-78.

344. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 65-82 (1994).

345. Mosteller, *supra* note 124, at 513. The point, then, is that embracing evidentiary politics should not mean that the judge should countenance a tyranny of the majority. Popular sentiment might, for example, favor a particular evidentiary ruling in a high profile case because that ruling may be perceived as tough on crime. But if the ruling is also one that would contribute to racial or gender stereotyping and promote a less caring and egalitarian society, then bowing to majority will would undermine feminist political values. Similarly, scholars and judicial advisory committees proposing new evidence rules should be wary of enforcing majority tyranny. Evidence law will be political, and the majority will seek to influence the judiciary (sometimes for good, sometimes for ill), whether we recognize it or not. What I am arguing for is candor as a way to enable us to reduce the pernicious effects of politics, while embracing the positive, political value choices that we inevitably must make.

not be heard do so. Honesty, care, and open-mindedness are traits that the public will honor from our robed men and women in black.³⁴⁶

Mosteller's powerful insight that politics partly explains some group character evidence decisions³⁴⁷ should therefore be welcomed, not feared; clarified, not ignored; and extended, not cabined. I would indeed extend his insight in one further way—recognizing that, in addition to epistemic power, evidentiary politics includes "social power."

C. Social Power

"Social power" concerns itself with nonepistemic politics, that is, with value and power-based concerns that have little to do with "accurate" fact-finding. While epistemic power concerns itself with defining courtroom reality, social power concerns itself with constituting us as the kind of society we want to be.

Epistemic power does have an impact on the broader society by altering the distribution of resources among groups. But social power focuses on the impact of our evidence practices on society as a whole, rather than (as do epistemic and interest group politics) the impact on individuals or groups. Thus, when we define reality, we promote certain outcomes in trials and thereby shift resources among groups (epistemic power). But we simultaneously have broader impacts on society as a whole (social power). For example, seeing some racial groups as biologically inferior to others is a vision of reality that promotes a racist society, a result that evidence rules can promote or diminish, thus involving social power.³⁴⁸

Yet social power is concerned at the same time with more than the broader social impact of epistemic visions. How a trial is run (to demean victims or to respect all); how jurors are treated (as a mass of conflicting biases or as a deliberative community); and how lawyers behave (as brutal warriors or as respectful promoters of differing voices in public decision-making) also have broader social conse-

346. See Taslitz, *Interpretive Method*, *supra* note 113, at 399–401. Indeed, these same concerns about the dangers of majoritarian politics might be reason to fear legislative, but not necessarily judicial, involvement in crafting evidence rules.

347. See Mosteller, *supra* note 124, at 465–66.

348. See ARMOUR, *supra* note 94.

quences.³⁴⁹ This tripartite political schema—epistemic, interest group, and social power—thus serves as a checklist, a reminder of the political pluses and minuses of our evidentiary reasoning. Importantly, however, social power is not meant to trump epistemic judgments: policy makers are not asked to promote verdicts that achieve positive social results at the cost of ignoring the most plausible definition of “reality” in a particular case. Understanding why this is so is the next step in explaining and illustrating social power.

The social power concept is also rooted in pragmatism.³⁵⁰ Pragmatists recognize that every decision carries with it a risk of error.³⁵¹ But two risks of equal size should be weighed differently if they impose different absolute costs.³⁵² For example, not setting your alarm clock on a Saturday morning may mean that you miss an exciting baseball game, but not setting your alarm on a weekday when you are due to start a multi-million dollar trial may cost you your job. The risk of your sleeping late may be the same in each instance, let us say ten percent. The cost of your mistake is much higher, however, in the latter case than in the former. The pragmatist will, therefore, certainly set his alarm before the trial, though he might risk not doing so before the ball game.

Evidence rules also involve risks of error and associated costs.³⁵³ Social power focuses on the costs imposed on society as a whole, rather than on any group or individual. Thus, assume that excluding RTS creates a twenty percent chance of an erroneous acquittal. The

349. Each of these three illustrations, while partly implicating more than only the formal rules of evidence, are matters of important concern to evidence scholars. Our evidentiary practices must include formal evidence rules, informal customs, and lawyer's ethical codes, for all affect fact-finding and define the adversary system that is the bedrock for our methods of fact-determination. *See, e.g.,* MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 74–124 (1997) (discussing the connection between the adversary system and evidentiary rules and practices); PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* 52–56 (1998) (stating the interrelationship among ethical codes, the adversary system, and fact-finding); TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 15 (illustrating this interrelationship in rape cases); Taslitz & Styles-Anderson, *supra* note 315, at 787 (arguing that “the non-regulation [in the code of ethics] of lawyer racism, sexism and ethnic bias presently undermines” the fact-finding process).

350. *See* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26–30, 71–100 (1990) (articulating the pragmatists' approach to jurisprudence).

351. *See* POSNER, *supra* note 350, at 299–300.

352. *See* POSNER, *supra* note 350, at 299–300.

353. *See* ARMOUR, *supra* note 94 (describing the risks of trial error resulting from, and the associated social costs, of jurors' racist attitudes).

reason for that error might be that juries buy into various sexist biases that distort the social reality of rape victims. Buying into those biases and declaring a violent sexual act "non-rape" contributes to gender inequality.³⁵⁴ Psychic pain will be felt by the many women whose faith in the justice system will be rattled.³⁵⁵ These effects are magnified by large numbers of erroneous verdicts. Moreover, although one group (in this case women) suffers, the significant harms are the social ones that damage the polity as a whole—a more unequal, less caring, less legitimate social order.³⁵⁶ We should, therefore, take the social cost of our potential error into account in crafting admissibility rules regarding RTS.

There is, of course, an error rate for erroneous *convictions* resulting from admitting RTS. But this kind of error, discussed in terms of "probative value" versus "unfair prejudice,"³⁵⁷ often makes its way into traditional evidentiary analysis. Furthermore, the discussion is often in terms of individual, rather than social, harm—the injustice of falsely convicting *this* defendant.³⁵⁸ There certainly are underlying social concerns, such as wasted resources and a decreased confidence in jury verdicts. Again, these are concerns typically, even reflexively, raised in criminal evidence discussions.³⁵⁹ These concerns are so taken-for-granted that they are not even thought of as "political." Furthermore, they involve a far narrower range of social concerns than does a focus on social power. Social power expands our awareness of the political consequences of evidence law to include unequal respect, shattered relationships, blocked catharsis, reduced caring, and indeed *any* social costs associated with our evidence law.

Note what social power does not do: it does not justify convicting the innocent purely to serve a broader social need. Rather, social power simply reminds us of the costs of our mistakes in convicting the innocent or freeing the guilty.

Social power deserves the most weight in mental-state determinations. This is because epistemic and social power are then likely to

354. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 394–433.

355. See West, *supra* note 28, at 103–07, 120–21, 125–27 (recognizing that accounting for psychic pain caused by legal rules must be a component of a feminist jurisprudence).

356. See Taslitz, *Patriarchal Stories*, *supra* note 15, at 433–75. (explaining how oppressive trial evidence and patriarchy mutually reinforce one another).

357. FED. R. EVID. 403.

358. See MCCORMICK ON EVIDENCE (John William Strong et al. eds., 4th ed. 1992) (summarizing policies behind major evidentiary doctrines).

359. See MCCORMICK ON EVIDENCE, *supra* note 358.

point in the same direction. Thus, a rule that unduly burdens the task of bringing rape victims' reality into the courtroom both distorts social reality *and* promotes gender inequality.³⁶⁰

In the real world, of course, we cannot know in any quantitative way what are the risks and costs of our errors. Worldviews will clash so that the very process of gauging costs and risks is itself political. Epistemic and social politics fade into one another. Nevertheless, the distinction between the two types of evidentiary politics is worthwhile. While epistemic politics reminds us of the interpretive nature of our task, social politics reminds us that more than the fate of the parties before it is in the court's hands. Moreover, both kinds of politics create a space for debating the wisdom of the kind of caring and just social order to which feminists aspire.

CONCLUSION

This Article's central point has been that mental states are interpretive acts, not single, objective truths waiting "out there" to be discovered. Consequently, tests for the admissibility of scientific evidence, like *Daubert's*, that are based on a realist epistemology make little sense when applied to social science experts who offer testimony relevant to a defendant's or victim's mental state.

Furthermore, because the construction of mental states as interpretations necessarily involves the jury, any expert admissibility test must be based on a substantive theory about the jury's role. This Article has argued for a conception of the jury as a deliberative, communal body, one that feminist theory favors as a body to be trusted in the first instance. The jury is also a body that must be fully informed, open to many perspectives, and empathic if it is to serve its role effectively as a "judicious spectator." Therefore, expert evidence rules must have as their goal improving the quantity and quality of the evidence in a way that furthers the unbiased, empathic detachment of the jury. "Empathy" is particularly important for mental-state determinations,

360. See Taslitz, *Patriarchal Stories*, *supra* note 15 (explaining how evidence rules and practices in rape cases distort social reality while contributing to gender inequality). I have argued here that political concerns are a relevant consideration in admissibility decisions regarding mental state. For a fascinating and insightful argument that political considerations should be given overriding significance in such decision-making, and for a comprehensive model of how to do so, see Peter Margulies, *Adjudicating Identity: Subordination, Social Science Evidence, and Criminal Defense* (Aug. 20, 1997) (unpublished manuscript, on file with the *Michigan Journal of Gender & Law*).

which necessarily require the jury to some extent to stand in the defendant's shoes. But social science evidence that does not meet the standards of Popperian science may, nevertheless, further empathic detachment.

This Article has sought to illustrate several ways in which non-Popperian social science can be helpful to empathic, feminist juries: it offers them an acute observer, provides "evidentiary richness," overcomes cognitive blinders, and offers insights into the meaning of human actions and the uniqueness of each individual in a way that Popperian social science often does not.

Finally, this Article has examined the inherently political nature of evidence law. All rules of evidence have political aspects to them, which may include "epistemic power" (imposing one group's visions of reality on others), interest group power ("might makes right" or majority rule), and social power (imposing costs on society as a whole, rather than on any particular group or groups). Evidence rules will often have these political implications whether we acknowledge them or not. This Article has argued that candor is best: we should acknowledge the political influences and outcomes at work, and then either seek to minimize or embrace them as our normative goals dictate. Interest group power is often something to fear, especially where it serves to allow majorities to oppress minorities or subvert the kind of caring, just, relatively more egalitarian society to which feminism aspires. On the other hand, because mental states are interpretive acts, where there are choices to be made among plausible interpretations, or where there is a significant risk of error in choosing the most plausible interpretations, we should seek to encourage liberating, rather than socially harmful, choices. When we create and apply evidence rules, therefore, we must be attentive to how they have broader social impacts and the ways that they affect the distribution of resources among social groups. In other words, we should embrace social and epistemic power when making expert and other admissibility decisions. But we should never let political concerns lead us to accept expert testimony that does not credibly contribute to a plausible interpretation of the evidence.

The foundations for a feminist approach to social scientific evidence have, I hope, thus been laid. But a foundation does not a building make. I still must respond to arguments that my approach lapses into dreaded relativism. I must also suggest in more detail the kinds of standards courts must follow to screen out implausible

mental-state interpretations. In the course of doing so, I must further challenge the distortions caused by universalistic, masculinist, market-based notions of truth and “science” versus “non-science” dualisms. These are the tasks to which my companion piece will turn. ✽